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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

CHARLES MERINO,

Petitioner,

v.

SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA and RONALD BRUNDAGE,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Equal Protection clause of the Fourteenth Amendment to the United States Constitution is violated when a public employee is removed from his position based solely on sexual orientation.

PARTIES TO THE PROCEEDINGS

Charles Merino was the plaintiff in the Superior Court of San Diego County, cross-appellant in the Court of Appeals of the State of California, and petitioner in the Supreme Court of California.

San Diego County Council of the Boy Scouts of America and Ron Brundage were defendants in the Superior Court of San Diego County, cross-appellants in the Court of Appeals of the State of California, and respondent in the Supreme Court of California. City of San Diego was a defendant in the Superior Court of San Diego County, and was not a party in any other proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Charles Merino, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal for the Fourth Appellate District, State of California, entered in the above proceeding on May 21, 1997. The petition for review to the California Supreme Court was granted on July 30, 1997, and held pending resolution by the California Supreme Court of the case, *Curran v. Mt. Diablo Council of the Boy Scouts of America.*, S039738. The California Supreme Court dismissed Merino's petition on July 8, 1988.

OPINIONS BELOW

The opinion of the Court of Appeal for the Fourth Appellate District is set forth in the Appendix to this petition at App. 1-20. The judgment of the Superior Court of California for the County of San Diego is set forth in the Appendix to this petition on at App. 32-56.

JURISDICTION

The decision of the Court of Appeal for the State of California was entered on May 21, 1997. A timely petition for review was filed with the Supreme Court of the State of California. Review was granted, and later dismissed. An order dismissing the petition for review, filed July 8, 1998, is set forth on page 89 of the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. section 1287(a).

STATUTES INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

In May 1989, Petitioner CHARLES MERINO, a police officer with the El Cajon Police Department (ECPD) applied to Boy Scouts, through its chartered local council, San Diego County Council of the Boy Scouts of America, for an Explorer Post charter. MERINO, who was in charge of the ECPD Cadet program, sought to convert the Department's existing Cadet program into a law enforcement Explorer Post, a scouting group within Boy Scouts. In order to be the adult advisor of the Post, MERINO applied to be an adult member of the Boy Scouts. Boy Scours chartered the El Cajon Police Department as a sponsor of Explorer Post 2245 and approved MERINO's application to be a volunteer adult member of the Boy Scouts.

Exploring is the young adult program of the Boy Scouts of America for men and women aged 14 through 20. The program is developed by local community organizations, such as the El Cajon Police Department, which match the interests of young adults with the program resources of the chartered organization. The program, leadership, and membership of the Explorer Post are determined by the chartered organization within the framework of the policies and standards of the Boy Scouts of America. The Explorer Post charter agreement between ECPD and Boy Scouts states, among other

things, that the Department agrees to "conduct the Scouting program according to its own policies and guidelines as well as those of the Boy Scouts of America" and Boy Scouts agrees to "respect the aims and objectives of the organizations and offer the resources of Scouting to help in meeting those objectives."

In approximately December 1991, MERINO became involved in organizing a Citizens Patrol to patrol the Hillcrest area of San Diego, where MERINO lived, to assist police in the prevention of the numerous and increasing assaults and batteries on homosexuals in the Hillcrest area at the time. Boy Scouts learned of MERINO'S activities and determined that MERINO was an avowed homosexual. Boy Scouts views homosexuality as inconsistent with Scouting principles, specifically the requirement in the Scout Oath to be "morally straight". Boy Scouts therefore does not permit known or avowed homosexuals to be adult leaders. On the basis of his homosexuality, Boy Scouts, by letter dated August 25, 1992, signed by Council President RONALD BRUNDAGE, suspended MERINO'S registration.

The El Cajon Police Department, as a public agency, could not discriminate on the basis of sexual preference. It was the opinion of then-Chief of Police Jack Smith that it would be an unlawful adverse employment decision if he were to remove MERINO from the position of Explorer Post Advisor based on his sexual orientation. Chief Smith therefore allowed the El Cajon Police Department's Explorer program charter to expire. If MERINO is reinstated as the Explorer Advisor, the charter agreement will be reinstated, with MERINO as the advisor.

MERINO filed suit on December 14, 1992. The suit named as defendants SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA, RON BRUNDAGE, and the CITY OF SAN DIEGO. The complaint prayed for a Writ of Mandamus ordering the BOY SCOUTS to reinstate MERINO to his membership in BOY SCOUTS and to his position of Explorer Post Advisor, a permanent injunction preventing BOY SCOUTS from expelling MERINO from membership solely on the basis of his homosexuality, a writ commanding the CITY OF SAN DIEGO to terminate its lease with the BOY SCOUTS, and Declaratory relief.

The Court granted Summary Judgment to the CITY OF SAN DIEGO, holding that the relief sought against the City was premature.

The case went to trial on March 21, 1994. On July 7, 1994, the trial court, Hon. Anthony C. Joseph, ruled that the Boy Scouts had discriminated against MERINO in violation of the Unruh Act, and that the San Diego Human Dignity Ordinance did not apply since the Explorer Post was in the city of El Cajon and therefore "outside the jurisdiction of the Ordinance". The Court granted relief to MERINO as follows: $5000.00 in monetary damages; attorneys fees; and a Mandatory Injunction ordering the BOY SCOUTS to reinstate the Explorer Post charter for the El Cajon Police Department, upon application by MERINO, and to reinstate MERINO as the Explorer Advisor of the El Cajon Police Department post.

BOY SCOUTS appealed the court's judgment. MERINO cross-appealed on the court's ruling that the Human Dignity Ordinance did not apply. After briefing and oral

argument, the Court of Appeal, on May 21, 1997, reversed the judgment of the trial court with respect to the finding that BOY SCOUTS violated the Unruh Act, and affirmed the trial court's findings that the San Diego Human Dignity Ordinance did not apply.

Petitioner MERINO sought review from the California Supreme Court. The California Supreme Court issued a "grant and hold" pending the outcome of the Court's decision in *Curran v. Mt. Diablo Council of the Boy Scouts*. On July 8, 1998, the California Supreme Court dismissed MERINO's appeal.

REASONS FOR GRANTING THE WRIT

I.

THE SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS ASSUMED THE ROLE OF STATE ACTOR WHEN IT REMOVED MERINO FROM A POSITION WITHIN THE EL CAJON POLICE DEPARTMENT.

The Court of Appeal's decision ignored a critical point raised by MERINO: the fact that he was removed from a position within a public agency solely because of his sexual orientation. The Court of Appeal analyzed MERINO's claim solely according to California's public accommodation statute, the Unruh Act (California Civil Code section 51), ignoring the fact that the Boy Scouts, in overseeing an Explorer Post within the El Cajon Police Department, were not purely private actors.

The decision of the Court of Appeal, if allowed to stand, would severely weaken the Constitutional protections of public employees by allowing their rights to be

violated by private entities who perform government functions. This Court has consistently held that private entities, when performing public functions, assume the role of government and are therefore subject to Constitutional limitations. *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Terry v. Adams*, 345 U.S. 461 (1953). The undisputed facts of this case demonstrate that the Boy Scouts were performing a governmental function in overseeing a law enforcement assignment within the El Cajon Police Department. As such, they were subject to the limitations placed on government entities by the Equal Protection clause of the Fourteenth Amendment to the United States constitution.

The fact that MERINO's Explorer Post position was within a public agency cannot be ignored. This operative fact places the issue outside of standard public accommodation statute analysis, and into the area of Equal Protection. To hold otherwise is to ignore decades of well-developed law in this area holding that even private entities can be considered "state actors" when they perform public functions. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans v. Newton*, 382 U.S. 296, 299 (1966); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982).

Although this Court has written numerous opinions dealing with the Constitutional ramifications of private entities performing public functions, it has never taken up the issue in the context of what is perhaps the most common joint venture between municipalities and a private entity: the Explorer Post position. The Explorer program is a nationwide program of the Boy Scouts of America. The Boy Scouts have hundreds of Explorer

posts nationwide that operate primarily out of public agencies.

What makes the Explorer program problematic is the fact that it is the policy of the Boy Scouts that no avowed homosexuals be allowed membership. The Boy Scouts also require that Explorer post leaders become members of the Boy Scouts. Additionally, Boy Scouts require that the Explorer post will be operated within the bylaws of the Boy Scouts. Absent any ruling to the contrary, the Boy Scouts are thus free to operate an Explorer post within a public agency, and free to discriminate on the basis of sexual orientation in regard to who may hold the position of Explorer post leader. The court should use this case as an opportunity to further clarify the extent to which a public agency may affiliate itself with a private entity that practices discrimination.

II.

PETITIONER WAS DENIED EQUAL PROTECTION WHEN HE WAS REMOVED FROM THE POSITION OF EXPLORER POST LEADER SOLELY BECAUSE OF HIS SEXUAL ORIENTATION.

Claims that an individual has been discriminated against by the Government based on a particular classification are generally reviewed under a rational basis standard. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Under a rational basis standard, the Court will uphold the classification if it is rationally related to a legitimate governmental purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

However, when governmental activity is found to discriminate on the basis of a suspect classification, the

Court's standard of review is not as deferential. When the government has discriminated on the basis of gender, in order for such discrimination to be permissible, the state has the burden of demonstrating an "exceedingly persuasive justification" for such discrimination. *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 152 (1994); *United States v. Virginia*, 518 U.S. 515, 531 (1996). Moreover, "state actors may not rely on 'overbroad' generalizations to make judgments about people that are likely to . . . perpetuate historical patterns of discrimination. *United States v. Virginia*, 511 U.S. at 542 (internal citations omitted).

Discrimination on the basis of race or national origin is reviewed under an even more stringent standard. Such governmental action is reviewed under a strict scrutiny standard, whereby in order to be held valid, the action must be narrowly tailored to uphold a compelling state interest. *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

However, the Court has never taken the opportunity to define the proper standard of review for governmental discrimination on the basis of sexual orientation. In *Romer v. Evans*, 517 U.S. 520 (1996), the Court struck down an amendment to the Colorado State Constitution which nullified all anti-discrimination statutes as applied to gays, lesbians, and bisexuals, and which prevented the state from enacting any future legislation intended to prevent and redress discrimination on the basis of sexual orientation. However, the Court did not address the question of what standard of review should be applied to governmental discrimination on the basis of sexual orientation. The court found that the Colorado amendment defied conventional analysis and determined that it could not withstand even a rational basis analysis. *Romer*, 517

U.S. at 632. Thus, the Court did not address the issue of what standard of review would be applied to governmental discrimination against homosexuals in a more conventional equal protection case.

The issue is of particular significance in this case because petitioner MERINO, at the trial court, offered unrefuted evidence that his homosexuality was an immutable characteristic. MERINO offered the expert testimony of Dr. Simon Levay, who testified that his research confirmed the fact that homosexuality was not a "lifestyle choice", but rather a biological condition over which people have no control. (Appendix 54, fn. 7). No contrary evidence was offered.

The immutability of the trait of homosexuality is important to the analysis because, not coincidentally, all of the classifications which this court has found to be "suspect" and therefore warrant greater scrutiny, involve immutable characteristics. Classification based on race, gender, and national origin all warrant some form of heightened scrutiny. It is anathema to the concept of Equal Protection that people be treated adversely because of a trait based on their status, rather than their conduct. "The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born. *Michael M. v. Superior Court*, 450 U.S. 464, 477-478 (1981).

This Court could use this case to establish the appropriate standard of review for Equal Protection claims. However, Petitioner MERINO's claim is by no means predicated on the requirement that belief that his removal

should be reviewed under a heightened standard. Petitioner MERINO contends that the justification for removing him from his Explorer post position could not even withstand a rational basis standard of review. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. 620, 632 (1996). Boy Scouts can establish no rational basis for removing MERINO from his post solely because of his homosexuality.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should be granted to review the decision of the Court of Appeal, State of California.

Respectfully submitted,

LAW OFFICES OF EVERETT L. BOBBITT

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Dated: September 29, 1998

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHARLES MERINO, Plaintiff and Appellant, v. SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA, et al., Defendants and Appellants.	D021969 (Super. Ct. No. 659236)
CHARLES MERINO, Plaintiff and Respondent, v. SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA, et al., Defendants and Appellants.	D022829 (Filed May 21, 1997)

APPEAL from a judgment and order of the Superior Court of San Diego County, Anthony C. Joseph, Judge. Affirmed in part and reversed in part.

In this action for declaratory and injunctive relief, mandate, and damages, Charles Merino seeks reinstatement to his former position of adult advisor to an

Explorer Scout post chartered by the Boy Scouts of America (BSA), after BSA suspended him as an adult volunteer after he publicly announced that he is a homosexual. The superior court ruled in favor of Merino, concluding that BSA constituted a business establishment within the meaning of the Unruh Civil Rights Act (Civ. Code,[1] § 51 et seq.) (here, the Unruh Act or the Act). The court further ruled that application of the Unruh Act would not violate the First Amendment freedom of expression rights of BSA, particularly freedom of association. (U.S. Const., Amend. I.) A mandatory injunction was issued to compel reinstatement and rechartering of the Explorer post with which Merino had been associated.

BSA now appeals, contending the trial court erred in characterizing BSA as a business establishment and in finding no undue burden on BSA's constitutional rights by applying the Unruh Act to this set of facts to compel reinstatement. Merino cross-appeals, arguing that the trial court erroneously declined to apply a City of San Diego ordinance, the Human Dignity Ordinance (San Diego Mun. Code, § 52.9601 et seq.) (HDO or the local ordinance) to compel reinstatement here.

In deciding these sensitive issues, we do not write on a clean slate. The California Supreme Court now has before it an Unruh Act case challenging the policy of BSA to refuse to allow homosexual persons to serve as scout leaders (*Curran v. Mount Diablo Council of the Boy Scouts* (1994) 48 Cal.App.4th 670 (review granted June 2, 1994

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[1] All statutory references are to the Civil Code unless otherwise specified.

(S039738)), and an Unruh Act case challenging the policy of BSA to refuse to allow boys who do not believe in God to become members (*Randall v. Orange County Council* (1994) 47 Cal.App.4th 576 (review granted June 2, 1994 (S039161)). On the main Unruh Act issue, the Court of Appeal majorities in those two cases reached opposite results, the court in *Curran* concluding BSA does not constitute a business establishment and the court in *Randall* concluding it does. The Supreme Court will resolve the Unruh Act issues, but, at this writing, oral argument is not yet scheduled. We therefore proceed to decide this pending case pursuant to existing law.

In resolving the statutory and legal issues presented, we follow the lead of the Supreme Court in *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 598 *(Warfield)*: Our analysis "does not turn upon our personal views as to the wisdom or morality" of the policies under challenge in this case. As well-stated by Chief Justice Lucas in dissent in *Warfield*: "My personal views . . . are irrelevant. Our judicial role is to apply the law, not to make it." (*Id.* at p. 632.) Thus, we do not address the merits of the moral and social issues concerning homosexuality and/or youth in our society. Nor need we reach any issues concerning Merino's personal fitness to serve as an adult volunteer at the Explorer post at issue.

Rather, our task is to interpret the Unruh Act language with regard to these facts. We conclude BSA cannot properly be characterized as a business establishment under the criteria set forth in *Warfield, supra,* 10 Cal.4th 594. We accordingly do not reach the issue of whether, even if the Unruh Act could properly apply to these facts, the First Amendment right of freedom of association

would preclude enforcement of the Act to require BSA to include as an adult volunteer a person who would substantially inhibit the association's message. We affirm the judgment insofar as the trial court correctly concluded the Human Dignity Ordinance has no applicability to these facts, but reverse the judgment as to the dispositive Unruh Act issues presented (except that our resolution of the main issues makes it unnecessary for us to address the reinstatement claim). The trial court will accordingly be directed to enter a different judgment in favor of BSA.

I

Background

This case was tried on stipulated facts, a copy of which we attach as appendix A to this opinion, and discuss as appropriate in connection with each of the substantive claims presented. In brief, these facts deal with the organizational structure of scouting, the financial status and personnel organization of BSA, its membership statistics, and the text of the scout oath and the scout law, as well as definitions of the crucially important terms "morally straight" and "clean" as used in scouting practice. BSA does not accept known or avowed homosexuals as adult leaders because it believes that homosexual conduct is inconsistent with the scout oath and law. (Appen. A [App. 53].) This policy is set forth in 1978 and 1991 position statements promulgated by BSA and admitted into evidence at trial. The 1978 position statement says that an individual who openly declares himself to be a homosexual may not be a volunteer scout leader, as follows:

> "We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership."

The 1978 position statement continues: "[BSA] does not knowingly employ homosexuals as professionals or nonprofessionals."

In the 1991 position statement, entitled "Homosexuality and the BSA," instead of stating that homosexuality itself and leadership in scouting are inappropriate, the emphasis is now placed upon homosexual conduct, such that: "We believe that homosexual conduct is not compatible with the aims and purposes of scouting and that it does not present a desirable role model for the youth in our program." The following question is then posed and answered:

> "Q: Are you implying by your policy that homosexuals do not have good moral or emotional character?
>
> A: Our position is that they do not present a role model which we seek for our youth members."

The 1991 position statement further declares that BSA has for more than 80 years brought the moral values of the scout oath and scout law to American boys, and also places strong emphasis on traditional family values as being necessary components of a strong, healthy society. It continues:

> "We believe that homosexual conduct is inconsistent with the requirements in the Scout Oath that a Scout be morally straight and in the Scout

> law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts. [¶] Because of these beliefs, [BSA] does not accept homosexuals as members or as leaders, whether in volunteer or professional capacities. [¶] Our position on this issue is based solely upon our desire to provide the appropriate environment and role models which reflect Scouting's values and beliefs."

The stipulated facts go on to describe Merino's experiences in administering youth programs at the El Cajon Police Department, where he has been employed since 1977, and his involvement with scouting from 1989 through 1992. The period of this involvement covered the times when both the 1978 and 1991 position statements were in effect.

At the conclusion of trial, the trial court determined that BSA may not exclude or remove avowed homosexuals from membership in BSA unless the conduct of such person is violative of BSA rules which apply equally to all BSA members without regard to homosexuality. The court found Merino had been expelled from BSA solely based on his classification as an avowed homosexual, which was found to be a status-based discrimination. After first stating that BSA does not exist for an expressive purpose, the court ruled that requiring BSA to end discrimination against avowed homosexuals served a compelling state interest to eliminate arbitrary discrimination, and thus the Unruh Act applied despite BSA's expressive associational rights, if any. Five thousand dollars money damages was awarded, plus attorney fees and costs, and a mandatory injunction was issued requiring reinstatement and rechartering of the Explorer post. The

writ of mandamus was denied and the City of San Diego was thus not required to invoke the provisions of the local ordinance. BSA appealed the judgment and Merino cross-appealed regarding the local ordinance ruling.[2]

II

Standard of Review

We analyze this record with these standards in mind:

> " '[T]he construction of statutes and the ascertainment of legislative intent are purely questions of law. This court is not limited by the interpretation of the statute made by the trial court. . . . ' [Citation.]" (*Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.APP. 4th 383, 391-392.)

In *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159, the Supreme Court set forth the basic rule: "In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose, i.e., the object to be achieved and the evil to be prevented by the legislation. [Citations.]"

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[2] BSA's separate appeal, No. D022829, regarding fees and costs awarded to Merino has been consolidated with this appeal. Those issues, however, were never briefed and will not be addressed here. In any case, due to our disposition, the fee award becomes moot and will be vacated.

The Individual Rights Foundation has filed an amicus curiae brief in support of BSA's position on the appeal. (Cal. Rules of Court, rule 14(b).

As explained by the court in *Beaty v. Truck Ins. Exchange* (1992) 6 Cal.App.4th 1455, 1460, we may take it as a given that the term "sex" in the Unruh Act is interpreted to include "sexual orientation" as a protected category.

With regard to the interpretation of another statutory term the Supreme Court explained in *Warfield, supra,* 10 Cal.4th at p. 607, footnote 7 that the question whether the particular defendant club constituted a "business establishment" within the meaning of the Unruh Act was one of law to be decided by the trial court, not one of fact to be decided by the finder of fact. Whether a particular kind of entity constitutes a business establishment for purposes of section 51 is a question of statutory interpretation to be decided by the court. (*Warfield, supra,* at p. 607, fn. 7.)

With all these rules in mind, we apply the criteria of *Warfield* to this record, and then turn to the issues raised by the cross-appeal concerning the local ordinance.

III

Unruh Act: Business Establishment Criteria

" 'Enacted in 1959, the Unruh Act secures equal access to public accommodations and prohibits discrimination by business establishments.' [Citation.] Amended at various times since 1959, Civil Code section 51 now provides in pertinent part: 'All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national

origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.' " (*Beaty v. Truck Ins. Exchange, supra,* 6 Cal.App.4th at p. 1461.)

What is the intended scope of the language of section 51 with regard to the definition of "business establishment"? The court in *Hart v. Cult Awareness Network* (1993) 13 Cal.App.4th 777 set out this summary of the law defining this term:

> " 'The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh [ ] Act (Civ. Code, § 51), and the inclusion of these words, without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." [Citations.] The word "establishment," as broadly defined includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position (as in life or business)." ' " [Citation.]
>
> "An organization is not excluded from the scope of Civil Code section 51 simply because it is nonprofit. [Citation.] However, 'the statute does not govern relationships which are truly

> private – . . . those which are "continuous, personal, and social" [citation] and take place more or less outside "public view." [Citation.] "Private" groups and institutions do not fall prey to the Act simply because they operate "nongratuitous" residential or recreational facilities for their members or participants; an "accommodation" must be "public" to be covered. Conversely, we have stressed that the statute was intended to include those kinds of recreational *facilities* traditionally deemed "accommodations." We have not suggested that noncommercial groups which do not operate such facilities are covered "business establishments." (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 84, fn. 14, original italics.)" (*Hart v. Cult Awareness Network, supra,* 13 Cal.App.4th at pp. 786-787.)

A nonprofit organization is subject to the Unruh Act only where it has a business purpose (e.g., maintenance of condominium property, *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 796) or where the organization offers a traditional public accommodation (e.g., pool and gymnasium, *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72). In *Isbister*, the Supreme Court majority opinion included these cautionary comments in connection with issuing its ruling that the Boys' Club of Santa Cruz was a public accommodation subject to the Unruh Act because there was no attempt to restrict membership or access to that facility on the basis of personal, cultural or religious affinity:

> "In a similar vein, Justice Mosk [in dissent] complains that our interpretation threatens many traditionally sex-segregated institutions, such as

> fraternities and sororities, private schools, *and scouting organizations.* Nothing we have said compels that result. The Act covers 'business establishments' of every kind, and these include traditional 'public accommodations.' *Yet we have emphasized that the statute does not govern relationships which are truly private – to paraphrase Horowitz' words, those which are 'continuous, personal, and social' [citation] and take place more or less outside 'public view.' [Citation.] 'Private' groups and institutions do not fall prey to the Act simply because they operate 'nongratuitous' residential or recreational facilities for their members or participants; an 'accommodation' must be 'public' to be covered." (Isbister v. Boys' Club of Santa Cruz, Inc., supra,* 40 Cal.3d at p. 84, fn. 14, italics added, citing *Horowitz,* The 1959 California Equal Rights in "Business Establishments" Statute (1960) 33 So.Cal.L.Rev. 260.)

To decide if BSA and its operations constitute this type of public accommodation, we apply the criteria set out in *Warfield, supra,* 10 Cal.4th 594 for determining whether a particular entity properly should or should not be considered a private club whose membership decisions are exempt from a generally applicable public accommodation law:

> "(1) the selectivity of the group in the admission of members, (2) the size of the group, (3) the degree of membership control over the governance of the organization (and particularly the selection of new members), (4) the degree to which club facilities are available for use by nonmembers, and (5) whether the primary purpose served by the club is social or business.

> [Citations.] Although no single factor has been viewed as controlling, many decisions consider the selectivity or lack of selectivity in the admission process to be of prime importance." (*Warfield, supra,* 10 Cal.4th at p. 620.)[3]

These criteria may be grouped into three major categories, which we discuss separately: purpose, membership and economic activities. As a threshold matter, however, we note that Merino is incorrect in stating that the "*Curran I*" (*Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712) decision (see Annot., Exclusion or Expulsion from Association or Club as Violation of State Civil Rights Act (1985) 38 A.L.R.4th 628) definitively established that BSA is a business establishment. That decision reviewed a ruling on demurrer and was thus a pleading case where the allegations of the complaint were being assumed to be true.

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[3] In *Warfield*, the court applied these factors to conclude that "the Court of Appeal erred in affirming the trial court's determination that the country club here at issue does not constitute a 'business establishment' within the meaning of section 51. As we have explained, although a truly private social club generally would not constitute a 'business establishment' for purposes of this provision, the club in question in the case now before us – because it engaged in a variety of 'business transactions' with nonmembers on a regular basis – properly must be found, in light of this court's prior decisions, to fall within the very broad terms of section 51, which extend the act to '*all* business establishments of every *kind whatsoever.*' (Italics added.)" (*Warfield, supra,* 10 Cal. 4th at p. 630.) The court also concluded that application of the Unruh Act to the membership policies of the club did not violate its members' rights of association and privacy under the federal and California Constitutions. (*Ibid.*)

> "It is a foundational principle that: ' "[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts." ' [Citations.] 'A litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and in those in the case under consideration.' [Citations.]" (*Harris v. Capital Growth Investors XIV, supra,* 52 Cal. 3d at p. 1157.)

We may thus consider the matter afresh, as did the court in "*Curran II*" (*Curran v. Mount Diablo Council of the Boy Scouts, supra,* 48 Cal.App.4th 670), now on review before the Supreme Court.

A

Purpose of the Organization

Warfield, supra, 10 Cal.4th 594 teaches that a court deciding the "business establishment" issue must consider "whether the primary purpose served by the club is social or business." (*Id.* at p. 620.) The mission statement of BSA is: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and in other ways prepare them to make ethical choices over their lifetime in achieving their full potential. [¶] The values we strive to instill are based on those found in the Boy Scout Oath and Law." (See appen. A, p. 4 for text of the oath and law.) Although BSA engages in certain commercial activities, such as sales of scouting

goods in scouting stores and provision of recreational facilities to other youth groups, it is not seriously contended here that BSA has a business as opposed to a social primary purpose. (See pt. IIIC, *post*.)

B

Membership of the Organization

Under *Warfield, supra,* 10 Cal.4th 594 a court is next to consider the size of the group and its selectivity in admitting members, as well as the members' control over the governance of the organization. As shown in the stipulated facts (Appen. A [App. 49]), national membership totals in 1992 for youths were 4,150,148 and for adults were 1,189,512. In San Diego in 1992, the Explorer totals were 1,685 youth and 391 adult members. (*Ibid.*)[4] Elected adult leaders set policy for the organization. (Appen. A [App. 48].) The stipulated facts state in relevant part:

> "To become an adult leader for [BSA], an applicant must be 21 years of age, be a United States citizen, and complete and sign a volunteer leader application. Adult leaders must subscribe

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[4] Since this case deals with an adult leader, we need not discuss the membership applications and criteria for youths, which are in any case quite similar. Similarly, we focus here largely on the older scouting group, the Explorers (ages 14-20), since that is the group with which Merino was affiliated. It should also be noted that just as the Unruh Act applies to nonprofit as well as commercial organizations, it may apply to volunteer positions as well as paid positions, where such positions affect a person's advantages or privileges of membership. (See *Quinnipiac Coun. v. Com'n on Human Rights* (Conn. 1987) 528 A.2d 352.)

> to principles as set forth in the oath and Law and the Declaration of Religious Principle [promoting nonsectarian religious values]. . . . " (Appen. A [App. 51-52].)

Testimony at trial established that the role of an adult volunteer in BSA is to provide youth with a positive example of a person living according to the oath and law. It was a stipulated fact at trial that BSA regards homosexual conduct as being inconsistent with the scout oath and law, and thus does not accept known or avowed homosexuals as adult leaders. (Appen. A [App. 53].) However, the adult membership application makes no mention of homosexuality.

From these facts it may readily be concluded that BSA, although a very large organization, makes significant although not extreme attempts to be selective regarding the values adhered to by adult leaders. Size alone is not an indicator that an organization must be regarded as a business establishment. (*Warfield, supra,* 10 Cal.4th at p. 619.) Nor does an organization's personnel and management structure alone indicate businesslike attributes.

BSA witnesses at trial clearly stated that BSA did not attempt to discover the sexual orientation of its adult volunteers, but rather only dealt with that issue if such a person made a public declaration or avowal of homosexuality. Thus, the group of adult volunteers under consideration in this lawsuit has always been known or avowed homosexuals who seek to serve as adult leaders.

Our conclusion regarding the membership prong of the test for whether an organization is a business establishment is that BSA made adequate efforts to be selective regarding the qualities and values exhibited by its adult leaders in order to retain the private quality of the organization. BSA is, in our view, chiefly an organization composed of and promoting relationships which are "continuous, personal and social," which take place more or less outside the public view. (*Isbister v. Boys' Club of Santa Cruz, Inc., supra,* 40 Cal.3d at p. 84, fn. 14.) Its membership policies do not bring it within the purview of the Unruh Act.

C

Economic Activities

We next consider the degree to which BSA facilities are made available for use by nonmembers to assist in deciding if BSA qualifies as a business establishment. (*Warfield, supra,* 10 Cal.4th at p. 620.) Evidence was presented that BSA has scouting stores selling scouting and other goods, and provides a concession to department stores to sell scouting apparel. These economic activities are incidental to and conducted in furtherance of its expressive purposes, not mainly for business purposes.

BSA also operates recreational facilities in Balboa Park and at Fiesta Island, on properties leased to it by the City of San Diego.[5] These facilities are made available to

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[5] Before trial, the City of San Diego was granted summary adjudication as to Merino's claims against it that the HDO local ordinance applied, although the ruling was made without

other youth organizations, church groups and the public for a small fee. BSA maintains these facilities at its own expense. Although this activity in some respects resembles the public access and use of the golf club by nonmembers in the *Warfield* case, it is different in character in that it promotes the overall mission of BSA to serve youth in the community, not to create profit to subsidize the other operations of the organization. " 'Private' groups and institutions do not fall prey to the Act simply because they operate 'nongratuitous' residential or recreational facilities for their members or participants; an 'accommodation' must be 'public' to be covered." (*Isbister v. Boys' Club of Santa Cruz, Inc., supra,* 40 Cal.3d at p. 84, fn. 14.) The BSA organization does not exist mainly for the purpose of providing these accommodations. (*Ibid.*) We believe this type of economic activity furthers the expressive goals of the organization and does not require BSA to be characterized as a business establishment.[6]

For all these reasons, we conclude BSA is not a business establishment within the meaning of the Unruh

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prejudice to a later petition for writ of mandate on any remaining issues as to the City. The final judgment in this action only grants relief in favor of Merino against BSA and ruled against Merino and in favor of the City on the HDO issues. (See pt. IV, *post*.) The City is not a party to this appeal.

[6] The federal public accommodations law has been held not to apply to scouting in *Welsh v. Boy Scouts of America* (7th Cir. 1993) 993 F.2d 1267. Similar results have been reached by several state courts construing their own public accommodations statutes: *Seabourn v. Coronado Area Council* (Kan. 1995) 891 P.2d 385; *Schwenk v. Boy Scouts of America* (Ore. 1976) 551 P.2d 465; and *Quinnipiac Coun. v. Com'n on Human Rights, supra,* 528 A.2d 352.)

Act. The freedom of expression issues raised by BSA will accordingly not be discussed here.

IV

Local Ordinance

The City of San Diego Human Dignity Ordinance provides in relevant part:

> "It shall be an unlawful business practice for any person to deny any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any business establishment on the basis (in whole or in part) of such individual's sexual orientation." (San Diego Mun. Code, § 52.9605, subd. (A)(1).)
>
> "It shall be an unlawful service practice for any person to deny any individual the full and equal enjoyment of . . . any service, program or facility wholly or partially funded or otherwise supported by The City of San Diego, on the basis (in whole or in part) of such individual's sexual orientation." (San Diego Mun. Code, § 52.9606, subd. (A)(3).)

The trial court rejected Merino's argument that this ordinance applied to his suspension from membership by BSA, a national organization, and his request to be reinstated at the El Cajon Police Department Explorer Post, stating "[t]his relationship is outside the jurisdiction of the Ordinance. The fact the local council of the Boy Scouts was headquartered in the City of San Diego is of no effect." The court noted that Merino had not shown he was denied access to the recreational facilities on leased

City of San Diego property, nor that such facilities were supported by the City of San Diego within the meaning of the ordinance.

Merino challenges this ruling in his cross-appeal, claiming that he as a resident of the City of San Diego is entitled to the protection of the ordinance under these facts. He also contends that the San Diego Council of BSA is the relevant entity for purposes of applying the ordinance, so he should be able to enforce it based on City of San Diego leases of property to BSA. (San Diego Mun. Code, § 52.9609, subd. (A).)

BSA responds that the ordinance is vague and overbroad, and the subject matter of this ordinance is subject to state regulation and thus the ordinance is preempted by state law, specifically the Unruh Act. (See *Delaney v. Superior Fast Freight* (1993) 14 Cal.App.4th 590, 597.) Without addressing these specific arguments, it is enough for our purposes to state that BSA does not qualify as a business establishment in San Diego or elsewhere, and the subject relationships do not fall under City of San Diego jurisdiction.

V

Disposition

The judgment and order awarding attorney fees are reversed in their entirety with the exception that the trial court's ruling regarding the City of San Diego HDO remains in effect. The trial court is directed to enter a different judgment in favor of BSA in accordance with the

views expressed in this opinion. Each party to bear its own costs.

/s/ Huffman
HUFFMAN, Acting P.J.

WE CONCUR:

Nares
NARES, J.

Haller
HALLER, J.

Separate concurring opinion by Huffman, J.:

Because of the disposition in the majority opinion of the business establishment issues under the Unruh Act, my colleagues deem it unnecessary to address the significant freedom of expression issues raised and briefed by the parties, and relied on by the trial judge in issuing his ruling in the matter. I strongly disagree with that approach. I find the major issues here to be inextricably intertwined due to the historically unsettled nature of the law regarding the proper characterization of business establishments, particularly in the difficult area of organizations representing, as here, "relationships which are truly private – to paraphrase Horowitz' words, those which are 'continuous, personal, and social' [citation] and take place more or less outside 'public view.' [Citation.]" (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d

72, 84, fn. 14.) Accordingly, I take the unusual step of concurring separately with an opinion of which I am the author.

I am confident that the majority's interpretation of the Unruh Act is correct. To my way of thinking, however, it is not outside the realm of possibility that BSA could be brought within the extraordinarily broad characterization of a "business establishment" that has been developed by case law. In any case, labels such as "business establishment" should not be treated as talismanic; the proper approach requires us to recognize the particular nature of the organization and its purposes when resolving the legal and statutory question of its proper characterization. (*Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 607, fn. 7.) The inquiry then proceeds to a balancing of the legitimate state interests represented by the Unruh Act (i.e., preventing arbitrary discrimination) against the impact of any threatened intrusions into constitutionally protected expressive rights. The overall issue is the extent to which government may regulate the manner of expressive conduct and association. In general, the greater the businesslike character of the organization, the lesser protection is accorded its expressive rights to promote its particular views in a way which may constitute discrimination; conversely, where the organization exists primarily for promoting values to a like-minded membership, as opposed to promoting commerce, more rather than less First Amendment protection is due.

For these reasons, I believe it necessary and proper to set aside for the moment the majority's conclusions set forth above, and to assume arguendo that BSA may in

some sense be considered to be a business establishment under the Unruh Act. For example, such an approach may ultimately be required by the California Supreme Court when it rules upon the pending Boy Scout cases (see maj. opn., *ante*, at pp. 2-3). The question is thus presented whether the First Amendment freedom of association rights of BSA would be unduly infringed upon by application of Unruh Act regulation. Such associational rights may be described as follows:

> " 'As we observed in [*Roberts v. United States Jaycees* (1984) 468 U.S. 609], our cases have afforded constitutional protection to freedom of association in two distinct senses. First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. *Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities.* In many cases, government interference with one form of protected association will also burden the other form of association." [Citation.]" (*Hart v. Cult Awareness Network* (1993) 13 Cal.App.4th 777, 787, italics added.)[1]

Infringement upon freedom of association rights may be justified by regulations which serve compelling state interests and which are unrelated to the suppression of

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[1] This case falls mainly into the category of the second form of association, engaging in protected speech or religious activities; BSA has not specifically argued, and the trial court did not rule, that the "intimate or private relationship" form of association is involved here, concerning Explorer activities.

ideas, if the state interests cannot be served through less restrictive means. (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 623 (*Roberts*); Hart v. Cult Awareness Network, supra, 13 Cal.App.4th at p. 791.) My analysis would first consider the form of expression involved, and then determine the degree of protection to which it is constitutionally entitled, as follows.

The mission statement of BSA provides:

> "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and in other ways prepare them to make ethical choices over their lifetime in achieving their full potential. [¶] The values we strive to instill are based on those found in the Boy Scout Oath and Law." (See appen. A, p. 4 for text of the oath and law.)

BSA relies on its adult volunteers to provide role modeling for youth and indirect influences toward the values BSA promotes. This is done through counseling, teaching and other interaction with scouts. (See *Roberts, supra*, 468 U.S. at p. 636 (conc. opn., O'Connor, J.) ["protected expression may also take the form of quiet persuasion, inculcation of traditional values, and instruction of the young," citing the Boy Scout Handbook].)

As set forth above, BSA has issued position statements to the effect that "homosexual conduct is not compatible with the aims and purposes of Scouting" and "it does not present a desirable role model for the youth in our program." Among BSA's principles is an opposition to homosexual conduct as inconsistent with the Scout oath and law regarding the terms "morally straight" and "clean". (Appen. A [App. 58].) BSA seeks thereby "to

provide the appropriate environment and role models which reflect Scouting's values and beliefs." It does not adopt a position that homosexuals do not have good moral or emotional character, rather, it states: "Our position is that they do not present a role model which we seek for our youth members."

Thus, the message BSA seeks to convey to its membership does not include approval of homosexual conduct by a person who is acting as an appropriate role model and moral example. Moreover, some of the religious entities with which BSA is affiliated strongly disapprove of homosexual conduct, and evidence was presented that these entities would withdraw their support of scouting if BSA changed its position on this issue.

Federal case law sets out these parameters of the protected right of expressive association:

> " '[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.' [Citation.] 'There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. *Freedom of association therefore plainly presupposes a freedom not to associate.*' (*Id.* at p. 623.)" (*Hart v. Cult Awareness Network, supra,* 13 Cal.App.4th at p. 790, italics added.)

Such protections of the right of freedom of association and expression are subject to some restrictions:

> "The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. [Citations.]" (*Roberts, supra,* 468 U.S. at p. 623.)

Thus, incidental infringement of protected speech is permitted to the extent that the state's legitimate purposes are accomplished thereby. (*Roberts, supra,* 468 U.S. at p. 628.) A recent United States Supreme Court opinion, *Hurley v. Irish-American Gay Group of Boston* (1995) ___ U.S. ___ (115 S.Ct. 2338) has clarified the scope of protected expressive association. There the high court held that the state courts' application of the Massachusetts public accommodations law to require certain private citizens who organized a parade to include among the marchers a group imparting a message that the organizers did not wish to convey was a violation of the First Amendment. The court said the free speech principle involved "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." (*Id.* at p. ___ [115 S.Ct. at p. 2348].)

Explaining further, the United States Supreme Court said:

> "*New York State Club Association[, Inc. v. City of New York* (1987) 487 U.S. 1, 13] is also instructive by the contrast it provides. There, we turned back a facial challenge to a state antidiscrimination statute on the assumption that the expressive associational character of a dining club with

over 400 members could be sufficiently attenuated to permit application of the law even to such a private organization, *but we also recognized that the State did not prohibit exclusion of those whose views were at odds with positions espoused by the general club memberships.* [Citations.] In other words, although the association provided public benefits to which a State could ensure equal access, it was also engaged in expressive activity; *compelled access to the benefit, which was upheld, did not trespass on the organization's message itself.* If we were to analyze this case strictly along those lines, GLIB [the gay group involved in *Hurley*] would lose. Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message *just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." (Hurley v. Irish-American Gay Group of Boston, supra,* ___ U.S. at p. ___ (115 S.Ct. at p. 2351], italics added.)

To explain this ruling, the Supreme Court concluded:

"Our holding today rests not on any particular view about the [association's] message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the [State's] power to compel the speaker to alter the message by including one more acceptable to others." (*Hurley v. Irish-American Gay Group of Boston, supra,* ___ U.S. at p. ___ [115 S.Ct. at p. 2351].)

California case law has also addressed the parameters of the right of expressive association. *Warfield v. Peninsula Golf & Country Club, supra,* 10 Cal. 4th at pages 624-628 recognized that application of the Unruh Act would be constitutionally prohibited where an institution is organized for an expressive purpose and would not be able to advocate its desired viewpoint nearly as effectively if it could not confine its membership to those who share the same views. Such expressive activities are entitled to constitutional protection. (*Roberts, supra,* 468 U.S. at pp. 628-629.)

Under this approach, the interplay of expressive association rights and the Unruh Act must be considered. Even if an organization may be considered to be a business establishment, it may still have expressive rights to be evaluated as to any permissible restrictions. (*Roberts, supra,* 468 U.S. at p. 623.) To my mind, the question then becomes whether the trial court was correct in ruling that since the right to associate for expressive purposes is not absolute, the compelling state interest of ending arbitrary discrimination as expressed in the Unruh Act must overcome the expressive associational rights of BSA to pursue its leadership selection criteria policies.

Membership criteria is of prime importance in both the Unruh Act context and in freedom of association doctrine. In general, a state may enact and enforce antidiscrimination laws to prevent an association from using such specified characteristics as race and sex as shorthand measures of eligibility in place of more legitimate criteria for determining membership. (*New York State Club Association, Inc. v. City of New York* (1987) 487 U.S. 1, 13. However, the U.S. Supreme Court also affirmed in that

case that "an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its memberships to those who share the same sex, for example, or the same religion." (*Ibid.*) Moreover, a club may permissibly seek to exclude individuals who do not share the views the club's members wish to promote. (*Ibid.*)

I perceive here a significant clash between the laudable objectives of the Unruh Act, to combat arbitrary discrimination, and the paramount importance of protection of freedom of expressive association. BSA represents a unique blend of numerous purposes, some of which are clearly expressive in nature and within the protected arena of association for religious and cultural purposes; at the same time, it has some attributes or characteristics of a business establishment (e.g., a large membership and varying degrees of membership selectivity). The question then becomes whether enforcing the Unruh Act "business establishment" standards under these circumstances trespasses upon the organization's chosen message itself, or dilutes that message through state action. (*Hurley v. Irish-American Gay Group of Boston, supra,* ___ U.S. at p. ___ [115 S.Ct. at p. 2351].)

Turning to the record in this case, the parties stipulated that BSA as an institution believes that homosexuality is inconsistent with its goals, objectives and principles, and that adults selected for leadership positions must agree to be guided by the scout oath and law. To my mind, the record demonstrates that contrary to the trial court's finding, BSA manifests a clearly expressive purpose, due to the great extent that its many activities

are value-driven. For example, the charter and bylaws of BSA state that its purpose shall be "to promote through organization, and cooperation with other agencies, the ability of members to do things for themselves and others, to train them in scoutcraft, *and to teach them patriotism, courage, self-reliance, and kindred virtues,* using the method which are now in common use by Boy Scouts." (Italics added.) And, of course, all these activities are guided by the scout oath and law, designed to set forth certain values and morals.

In my view, and in light of those undisputed institutional purposes, application of the Unruh Act to BSA in this case would impermissibly require it to accept into leadership positions those who promote goals and objectives that are inconsistent with the institution's expressive purpose. It makes no difference whether BSA is considered to be a full-fledged business establishment, or only to have some limited businesslike attributes. The point is that this result, compelling Merino's access to the benefits of membership in BSA, would violate the expressive association rights of BSA and its members that are specifically protected by the First Amendment. The Unruh Act cannot constitutionally be applied here because such access of an adult volunteer leader would trespass upon the organization's message itself. (*Hurley v. Irish-American Gay Group of Boston, supra,* ___ U.S. at p. ___ [115 S.Ct. at p. 2351].)

In my view, applying the Act here would suppress BSA's ideas that an avowed homosexual is not an appropriate role model and moral example within scouting. (See *Roberts, supra,* 468 U.S. at p. 623.) A person who is an avowed homosexual who seeks to serve as a scout leader

is manifesting views that are at odds with those of the organization on the issue of leadership criteria. (See *Hurley, supra,* ___ U.S. at p. ___ [115 S.Ct. at p. 2351].) It is established that an organization or club may permissibly seek to exclude individuals who do not share the views the club's members wish to promote, where it has shown that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoint nearly as effectively if it cannot confine its membership to those who share the same views. (*Ibid.*; also see *Warfield v. Peninsula Golf & Country Club, supra,* 10 Cal.4th at pp. 624-628.) A speaker or association should be able to choose not to propound a particular point of view, "and that choice is presumed to lie beyond the government's power to control." (*Hurley v. Irish-American Gay Group of Boston, supra,* ___ U.S. at p. ___ [115 S.Ct. at p. 2348].) That is the case here.

It is not because I agree with the position of BSA on this issue that I reach this conclusion; rather, the issue I see is BSA's right as an association to reach such a position and to conduct its operations accordingly. (*Ibid.*; see also *Warfield v. Peninsula Golf & Country Club, supra,* 10 Cal.4th at pp. 598, 632.) I would not, and I do not believe the majority opinion will, undermine in any way the important social goals, objectives, and authority of the Unruh Act within its proper scope of application. However, because of the particular characteristics and mission of BSA, the organization under discussion, I would conclude that the important state interest in preventing arbitrary discrimination is not implicated here in such a manner as to justify this degree of abridgment of the expressive conduct integrally involved in scouting.

(*Roberts, supra,* 468 U.S. at p. 628.) Where the state interest being promoted by the business accommodations statute is antithetical to an important expressive purpose of the organization, which is within its protected sphere of association, the statute cannot prevail over First Amendment rights. I would reverse the judgment on this ground also.

/s/ Huffman, J.
HUFFMAN, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CHARLES MERINO, Plaintiff, vs. SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA, RON BRUNDAGE, CITY OF SAN DIEGO, and DOES I through XX, inclusive, Defendants.	CASE NO. 659236 **STATEMENT OF DECISION AND JUDGMENT** (Filed Sept. 13, 1994)

The above-entitled cause came on regularly for trial in Department 43 of the above-entitled court, the Honorable Anthony C. Joseph, Judge, presiding without a jury. Plaintiff appeared by and through his attorneys of record, Bobbitt & Gattey, by Everett L. Bobbitt and Vicki L. Gilbreath. Defendants appeared by and through their attorneys of record, Hughes, Hubbard & Reed by George A. Davidson and Carla A. Kerr, and Edwards, White & Sooy, by Michael M. Edwards.

Oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. On July 7, 1994, the court issued a Decision in this matter. The parties then filed objections and proposals thereto. Pursuant to the court's statements in the Decision, plaintiff calendared a Motion for Injunction for telephonic hearing on August 26, 1994.

A written ruling on this motion was issued on August 26, 1994. Oral arguments on the ruling and on proposals to the statement of decision were heard on September 7, 1994.

The court, having considered the evidence and heard the arguments of counsel and being fully advised, issues the following statement of decision and judgment thereon. This statement of decision and judgment supersedes the court's Decision dated July 7, 1994.

INTRODUCTION

This matter involves the application of the Unruh Civil Rights Act (the "Unruh Act"), Civil Code section 51, and the San Diego Human Dignities Ordinance (the "Ordinance"), San Diego Municipal Code section 52.9601 *et seq.* to an avowed homosexual Explorer Scout adult leader. The Unruh Act prohibits arbitrary discrimination by "all business establishments of every kind whatsoever."[1] Plaintiff Charles Merino alleges a violation of the Unruh Act, the Ordinance, and the common law right of fair procedure by defendants San Diego County Council of the Boy Scouts of America, Boy Scouts of America and Ronald Brundage (hereinafter collectively referred to as the "Boy Scouts" or "defendants"). Mr. Merino seeks a

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[1] The Unruh Act provides in relevant part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

peremptory writ of mandate, injunctive relief, declaratory relief and damages.

The major issue presented is whether the Boy Scouts is a "business establishment"; and, if so, whether any constitutional principle precludes application of state and local civil rights law to the Boy Scouts.

During the pendency of this litigation, two appellate decisions were rendered which examined the application of the Unruh Act to the Boy Scouts. In *Randall vs. Orange County Council* (1994) 22 Cal.App.4th 1526, the Fourth Appellate District cited *Curran vs. Mt. Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712 (hereinafter referred as *"Curran I"*) for the proposition "[i]t has long been the law of California that the Boy Scouts, on the national and council levels, are businesses precluded from discrimination under the Unruh Act." (*Randall, supra,* 22 Cal.App.4th 1526 at 1529.) Recently, the Court of Appeal, Second Appellate District, reviewed the *Curran I* decision in *Curran vs. Council of the Boy Scouts of America* (1993) 23 Cal.App.4th 1307 (hereinafter referred to as *"Curran II"*). The majority in *Curran II* found the Boy Scouts was not a business establishment within the meaning of the Unruh Act.

The California Supreme Court has granted hearing on the petitions for review in both *Randall* and *Curran II*, holding these cases pending its review of *Warfield vs. Peninsula Golf & Country Club* (1993) 22 Cal.App.4th 1078. This grant of hearing by the Supreme Court depublishes both decisions; as such, the decisions have no precedential effect in any pending case. [Cal. Rule of Court, rule 976(d).]

This court has concluded, based on presently existing precedents, the Boy Scouts is a "business establishment" within the meaning of the Unruh Act, and the First Amendment rights of the Boy Scouts are not violated by application of the Unruh Act.

STATEMENT OF FACTS AGREED TO BY THE PARTIES[2]

Set forth are the relevant stipulated facts of the parties this case in the exact language from their agreement.

> The Boy Scouts of America is a federally-chartered non-profit organization. Boy Scouts of America charters local councils to accomplish the purposes of Scouting and carry out its programs in a given geographic area. Duly chartered local councils are incorporated according to the not-for-profit laws of their states of incorporation. Scouting is conducted through Scouting groups known as Cub Scout Packs and Dens, Boy Scout Troops and Patrols, and Explorer Posts.
>
> San Diego Council is a duly chartered local council of Boy Scouts incorporated under the not-for-profit laws of California. The Council's purpose is that of supporting Scouting groups within San Diego County in accordance with the *Charter, Bylaws* and *Rules and Regulations* of Boy Scouts of America.
>
> Boy Scouts charters sponsoring organizations meeting the requirements of the Bylaws and the Rules and Regulations of Boy Scouts of

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[2] (Exhibit 100, Stipulated Facts.)

America to organize and maintain Scout groups in accordance with Boy Scouts of America policies. The El Cajon Police Department was one such organization that sought and was granted a charter by Boy Scouts of America to form and maintain Explorer Post 2245 in El Cajon, California.

The sponsoring organization is charged with providing suitable facilities for meetings and activities and with selecting adult leadership that meets with the standards for membership of Boy Scouts of America.

Every sponsoring organization appoints one delegate to the local council, which elects an executive board. Each local council has at least three delegates to the National Council. The National Council elects the National Executive Board, which sets national policy for Boy Scouts. Each Scouting group is governed by the *Charter and Bylaws* and *Rules and Regulations* of Boy Scouts of America.

Adult leaders serve without pay from Boy Scouts of America or San Diego Council. To become an adult leader for Boy Scouts of America, an applicant must be 21 years of age, be a United States citizen, and complete and sign a volunteer leader application. Adult leaders must subscribe to principles as set forth in the Oath and Law and the Declaration of Religious Principle.[3]

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[3] The Scout Oath is: "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight."

The adult applicant must also pay the national registration fee and his or her application must be signed by the Scout group's Committee Chairman, the Chartered Organization Leader and the Scout Executive or a designee. One of the roles of an adult volunteer leader is to be a good role model for the youth in the Scout group.

Mr. Merino has been a police officer in the El Cajon Police Department since 1977. In 1982, Mr. Merino came to be in charge of the El Cajon Police Department Cadet program.

The Scout Law is: "A Scout is: Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, and Reverent."

The Declaration of Religious Principle is:

"The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, 'On my honor I will do my best to do my duty to God and my country and to obey the Scout Law.' The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members. No matter what the religious faith of the members may be, this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore, recognizes the religious element in the training of the member, but it is absolutely nonsectarian in its attitude toward that religious training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life."

In 1989, Mr. Merino sought and obtained permission from the Chief for the Department to affiliate with Boy Scouts of America as a chartered organization. He completed an application for the El Cajon Police Department to become a chartered organization of Boy Scouts of America to sponsor an Explorer Post. Mr. Merino also completed a volunteer leader application to be a member of Boy Scouts of America. Following the receipt of these applications, Boy Scouts of America chartered Post 2245 and Mr. Merino became an adult member of Boy Scouts of America and the Explorer Advisor of Post 2245.

Mr. Merino remained an adult leader in Boy Scouts of America as Explorer Advisor of Post 2245 from 1988 to on or about August 25, 1992.

Mr. Merino first publicly announced that he is homosexual in December 1991.

Because Boy Scouts of America believes that homosexual conduct is inconsistent with the Scout Oath and Law, Boy Scouts of America does not accept known or avowed homosexuals as adult leaders. Boy Scouts of America suspended Mr. Merino's registration as an adult volunteer on or about August 25, 1992. After Mr. Merino's membership as an adult volunteer was suspended, the El Cajon Police Department chose to withdraw its sponsorship of the Explorer program and resumed operating its Cadet program.

DISCUSSION

A. The Unruh Act prohibits discrimination on the basis of sexual orientation.

In *Harris vs. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, the California Supreme Court stated the Unruh Act applied to prevent arbitrary discrimination against homosexuals. (*Harris, supra,* 52 Cal.3d 1142 at 1155-1156, citing, *Rolon vs. Kulwitzky* (1984) 153 Cal.App.3d 289; *Curran I supra,* 147 Cal.App.3d 712; *Hubert vs. Williams* (1982) 133 Cal.App.3d Supp. 1.)

B. The Boy Scouts is a "business establishment" within the meaning of the Unruh Act.

The Unruh Act protects all persons from arbitrary discrimination in "accommodations, advantages, facilities privileges or services in all business establishments of every kind whatsoever." (Civil Code section 51, *supra,* fn. 2.) The term "business establishments" has been interpreted "in the broadest sense reasonably possible." [*Burks vs. Poppy Construction Co.* (1962) 57 Cal.2d 463, 468; accord *O'Connor vs. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 796; *Isbister vs. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 78; *Warfield vs. Peninsula Golf & Country Club* (1989) 214 Cal.App.3d 646, 654.] The Legislature has not intervened to curtail the broad judicial interpretation of the Unruh Act.

The Unruh Act applies to both profit-seeking and non-profit organizations. (*O'Connor, supra,* 33 Cal.3d 790 at 796.) The purposes and operations of an organization need not be strictly commercial in order to conclude the

organization is a "business establishment" to which the Unruh Act applies. (*Isbister, supra,* 40 Cal.3d 72 at 83.) In contrast, truly selective private organizations do not fall within the purview of the Unruh Act. [*Isbister, supra,* 40 Cal.3d 72 at 84, fn. 14; *Warfield, supra,* 214 Cal.App.3d 646 at 653-655; *Hart vs. Cult Awareness Network* (1993) 13 Cal.App.4th 777, 786-787.]

The court concludes, based upon the evidence in this case, the Boy Scouts is a "business establishment" within the broad meaning of the Unruh Act.[4] The Boy Scouts is not an exclusive private organization. The Boy Scouts is a large public organization that is far-reaching in American society and expanding world-wide. (*See,* Exhibit 26, Boy Scouts of America Annual Report 1990, p. 341; Exhibit 28, Preparing for the Future, pp. 407-409.) National membership in Boy Scouts of America, as of the 1992 Annual Statement, was 4,150,148 youth members and 1,189,512 adult members. Membership of Boy Scouts of America in San Diego as of December 31, 1992 was:

	Youth	Adult
Cub	11,981	4,266
Scout	6,489	3,444
Explorer	1,685	391
	20,155	8,101

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[4] In *Curran I,* the Second District Court of Appeal examined the "public" versus "private" aspects of the Boy Scouts and reversed a judgment of dismissal following sustaining of a demurrer by specifically holding the Boy Scouts is a "business establishment" within the meaning of the Unruh Act. (*Curran I, supra,* 147 Cal.App.3d 712 at 733.) The *Curran I* decision was cited by the Supreme Court for the proposition that the extension "to the youthful public of a membership invitation limited only by sex made it a 'public' organization covered by the Unruh Act." (*Isbister, supra,* 40 Cal.3d 72 at 81, fn. 8.)

Membership criteria for both juvenile and adult members are non-selective. The adult membership application contains no questions concerning the lifestyle or sexual orientation of the prospective adult member. (*See*, Exhibit 3, Boy Scouts of America Adult Application.) None of the Boy Scout Handbooks or publicly distributed Boy Scout materials use the word "homosexual" or any synonym thereof. (*See*, Testimony of Roy Williams, Transcript March 21, 1994, pp. 179-188.)

The Boy Scouts engage in "commercial" activities. Mr. Ronald Brundage, Chief Executive Officer of the local Boy Scouts, has been employed by the Boy Scouts for over thirty-three years. (Brundage Deposition, p. 9, line 6.) Mr. Brundage's salary is $112,000.00 per year, paid by the local council. (Brundage Deposition, p. 35, lines 20-22.) Mr. Brundage supervises a Scout store which sells Scout equipment. (Brundage Deposition, p. 7, lines 10-17.) Additionally, Boy Scout uniforms are sold at three or four distributorships and at some department stores.[5] (Brundage Deposition, p. 42, lines 6-16.)

The San Diego Council of the Boy Scouts employs, and Mr. Brundage supervises, approximately forty-four full-time employees: nineteen are professional Scouters; twenty-five are non-commissioned employees. Among

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[5] The national Boy Scouts' total revenues for the year ended in December 31, 1992 were $54,205,000. Total expenses for the year ended in December 31, 1992 were $49,977,000. The San Diego Council's 1992 projected income was in the amount of $2,375,596.00 and projected expenses were in the amount of $2,525,596.00.

the twenty-five are six camp rangers and one field assistant; the rest are secretaries or clerical workers. (Brundage Deposition, p. 7, lines 3-4; Stipulated Facts, paragraph 10.) The "management staff structure" of the Boy Scouts is formalized and reveals the business-like aspects of the organization. (Exhibit 21, 1990 San Diego County Council Staff Chart; Exhibit 22, 1993 Boy Scouts of America Management Staff Structure Chart.)

California courts have held large, non-selective membership organizations to be "business establishments of any kind whatsoever", in regard to Rotary Clubs [*Rotary Club of Duarte vs. Board of Directors* (1986) 178 Cal.App.3d 1035] or Boys Clubs (*Isbister, supra,* 40 Cal.3d 72). The United States Supreme Court has ruled similarly as to the Junior Chamber of Commerce. [*Roberts vs. United States Jaycees* (1984) 468 U.S. 609.]

Case law also supports application of the Unruh Act to protect the privilege of membership in non-profit organizations such as the Boy Scouts. [*Isbister, supra,* 40 Cal.3d 72; *Board of Directors of Rotary International vs. Rotary Club* (1987) 481 U.S. 537.] As an adult member of the Boy Scouts, Mr. Merino was arbitrarily denied the full advantages and privileges associated with being a member of the Boy Scouts. The Unruh Act applies to prohibit this arbitrary discrimination.

C. The San Diego Human Dignity Ordinance does not apply to this action.

Mr. Merino seeks relief under the San Diego Human Dignities Ordinance (the "Ordinance"), San Diego

Municipal Code section 52.9601 *et seq.*[6] The Ordinance declares the public policy of the City of San Diego is to prevent discrimination based on sexual orientation. [Ordinance, section 52.9601.]

Mr. Merino seeks to be reinstated in Boy Scouts of America, a national organization, and to resume being an Explorer Advisor for the El Cajon Police Department Explorer Post. Mr. Merino was the Explorer Advisor to an Explorer Post located in the City of El Cajon. This relationship is outside the jurisdiction of the Ordinance. The fact the local council of the Boy Scouts was headquartered in the City of San Diego is of no effect.

Section 52.9606(A) (3) of the Ordinance provides it is unlawful to deny any individual "the full and equal enjoyment of . . . any service, program or facility wholly or partially funded or otherwise supported by The City of San Diego on the basis (in whole or in part) of such individual's sexual orientation."

Mr. Merino argues application of section 52.9606(A) (3) of the Ordinance by presentation of evidence that the City of San Diego "supports" the Boy Scouts by leasing property in Balboa Park and on Fiesta Island to the Boy Scouts basically at no cost to the Boy Scouts. The record, however, does not sustain a finding that the City of San

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[6] The Ordinance provides in relevant part: "It shall be an unlawful business practice for any person to deny any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any business establishment on the basis (in whole or in part) of such individual's sexual orientation." [Ordinance, section 52.9605(A)(1).]

Diego funds or otherwise supports the Boy Scouts through the Balboa Park and Fiesta Island leases. More importantly, Mr. Merino has not shown he was denied "the full and equal enjoyment of" the Balboa Park or Fiesta Island properties. (*See*, Brundage Deposition, p. 96, lines 10-15; Merino Deposition, p. 37, lines 9-18.) The record does not support a finding the Ordinance applies to the facts of this case. This finding is dispositive of all other issues raised by the parties pertaining to the Ordinance.

D. Application of the Unruh Act to this case does not violate the First Amendment.

The federal constitution protects both "intimate" and "expressive" associational rights. [*Roberts vs. United States Jaycees* (1984) 468 U.S. 609.]

1. Intimate Associational Rights

Relationships distinguished by such attributes as "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" are protected from unwarranted state interference. [*Roberts, supra*, 468 U.S. 609 at 620.]

The degree of intimacy necessary to invoke freedom of associational privacy is not clearly defined. However, in determining whether an organization is entitled to

constitutional protection, factors such as its "size, purpose, policies, selectivity, congeniality", and other pertinent characteristics should be considered. [*Roberts, supra,* 468 U.S. 609 at 620.1

For example, the Pacific-Union Club of San Francisco may discriminate in member selection, as it seeks no public benefits, precludes member contact with the media, allows no discussions of business matters in connection with its activities, prohibits members from deducting club expenses from their income tax and exists solely for the purposes of conviviality. [*Pacific-Union Club vs. Superior Court* (1991) 232 Cal.App.3d 60.] In contrast, the United States Jaycees may not discriminate against women as, its organization is neither small nor selective. (*Roberts, supra,* 468 U.S. 609.)

Application of the Roberts factors to the Boy Scouts results in a finding that the Boy Scouts is not entitled to the protection of the freedom of intimate association.

The Boy Scouts is a nationwide organization which charters local councils to carry out its programs in a given geographic area. Groups which meet the requirements of the Boy Scouts are granted charters to organize and maintain Scout groups. Local councils and chartered organizations are bound by the national policies of the Boy Scouts of America. (Exhibit 100, Stipulated Facts, paragraphs 2, 5 and 8.)

Scouting is conducted through Scouting groups known as Cub Scout Packs and Dens, Boy Scout Troops and Patrols, and Explorer Posts. (Exhibit 100, Stipulated Facts, paragraph 3.) The relatively small size of these groups, however, does not permit the Boy Scouts as a

whole the right to practice invidious discrimination. [*See, New York State Club Association vs. City of New York* (1988) 487 U.S. 1, 12.]

Membership in the Boy Scouts is non-selective. (*Compare, Pacific-Union Club, supra,* 232 Cal.App.3d 60; *Hart vs. Cult Awareness Network, supra,* 13 Cal.App.4th 777.) The Boy Scouts is not intimate in terms of its purpose for existence, its programs and its size. The Boy Scouts does not conduct activities in an atmosphere of privacy and it routinely engages in activities which are public in nature. In sum, the Boy Scouts is not sufficiently "intimate" to override the mandate of the Unruh Act.

2. Expressive Associational Rights

Freedom of expressive association embraces a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." (*Roberts, supra,* 468 U.S. 609 at 622.) The freedom of expressive association accords "protection to collective effort on behalf of shared goals." (*Id.*) The right of expressive association allows an organization to exclude persons who would "impair the ability of the original members to express only those views that brought them together." (*Id.*)

The Boy Scouts does not exist for an "expressive" purpose. The aim of the Boy Scouts is to accomplish the purposes of Scouting. As stated at section 3 of the Charter and Bylaws of the Boy Scouts of America, "the purpose of this corporation shall be to promote, through organization, and cooperation with other agencies, the ability of

boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by Boy Scouts." (Exhibit 23, Charter and Bylaws of the Boy Scouts of America.)

During his three-year tenure as an adult leader, Mr. Merino furthered the purpose of and strongly believed in Scouting. (Transcript March 21, 1994, p. 28.) Mr. Merino testified that he practiced religion, believed in God, and held moral values. (Transcript March 21, 1994, p. 23, line 24-25; p. 44, line 17; p. 45, line 15.) A 1990 newspaper article in The Californian profiled Mr. Merino as a "role model". (Exhibit 79.) In a letter explaining the factual basis for Mr. Merino's termination from the Boy Scouts, Mr. Brundage stated: "Your professional service to the citizens of El Cajon has never been called into question, nor have the professional principles of the department." (Exhibit 6, Letter from Ronald Brundage to Mr. Merino dated September 23, 1992.)

Mr. Merino was expelled from the Boy Scouts solely based on his classification as an avowed homosexual. Exclusion of the entire class of avowed homosexuals is a status-based policy which results in invidious discrimination against certain individuals based on stereotyped notions. [*See, Watkins vs. U.S. Army* (9th Cir. 1989) 875 F.2d 699, 725.] Before avowed homosexuality may lawfully be used as a basis to expel an individual from membership in the Boy Scouts, a connection must be demonstrated between the individual's avowed homosexuality and any significant danger of harm to the Boy Scouts resulting from the individual's continued membership. (*See, Curran I, supra,* 147 Cal.App.3d 712 at 725.) Mr.

Merino testified repeatedly that he would serve as a role model for Explorer Scouts and he would not discuss issues of homosexuality or heterosexuality with Scouts. (Transcript March 21, 1994, pp. 32-33; 45.)

Discrimination based on status, absent any evidence of improper conduct, is arbitrary, capricious and offensive to public policy. The Boy Scouts' policy against known or avowed homosexuals was a stipulated fact in this case. (Exhibit 100, Stipulated Facts, paragraph 28.) The policy is grounded in the Boy Scout Law which requires a scout to be "clean", and the Boy Scout Oath which requires a scout to be "morally straight". (*Supra*, fn. 4.) Mr. Christopher Leach and Mr. Roy Williams testified it was the policy of the Boy Scouts to terminate the membership of avowed homosexuals. Being an avowed homosexual involved the public statement of a person's homosexuality. (*See*, Transcript March 21, 1994, pp. 101 and 189.) No definition of "public" was given.

Mr. Leach and Mr. Williams also testified the Boy Scouts would not revoke the membership of a person who remained silent regarding his sexual orientation. (*See*, Transcript March 21, 1994, p. 104, lines 4-17, and p. 189, lines 5-13.) The testimony elicited at trial suggests a homosexual can be a member of the Boy Scouts and remain a member as long as the person is not an avowed homosexual. In fact, Mr. Williams, a national Boy Scout representative testified, "We don't exclude gays. We exclude people who promote by declaring themselves as an avowed homosexual. And they promote a particular lifestyle that we don't think is appropriate for children." (Transcript March 21, 1994, p. 189, lines 6-9.)

Public acknowledgement of homosexuality does not translate to a "teaching" that homosexuality is proper or improper any more than a Scout admitting he is Catholic amounts to a "teaching" that Catholicism is the only "proper" religion. Any concerns the Boy Scouts may have regarding the fitness of an individual to be an adult leader and a proper role model can be addressed via reasonable rules of deportment related to conduct. [*See, In re Cox* (1970) 3 Cal.3d 205, 217.]

The right to associate for expressive purposes is not absolute. (*Roberts, supra,* 468 U.S. 609 at 623.) The elimination of arbitrary discrimination is a compelling state interest under the Unruh Act. Requiring the Boy Scouts to end discrimination against avowed homosexuals serves this compelling state interest and is unrelated to the suppression of ideas. Any impact the application of the Unruh Act has on the expressive associational rights of the Boy Scouts is justified by the compelling state interest of the Unruh Act to eliminate arbitrary discrimination.

E. Mr. Merino's common law right of fair procedure was not violated.

The right of fair procedure as a component of due process recognizes private associations must use fair procedure in excluding persons from membership. (*Ezekial vs. Winkley* (1977) 20 Cal.3d 267, 272.) The common law right of fair procedure requires at least adequate notice of the charges and a meaningful opportunity to respond. (*Id.*)

By letter, Mr. Merino was provided with notice of the reasons for the revoking of his membership in the Boy

Scouts. (Exhibit 6, Letter from Ronald Brundage to Mr. Merino dated September 23, 1992.) Mr. Merino was also provided a fair opportunity to present his position and seek reinstatement of his membership. (Exhibit 4, Letter from Ronald Brundage to Mr. Merino dated August 25, 1992.) Attached to the August 25, 1992 letter was a document entitled "Procedures of Review". While the court finds Mr. Merino's suspension from the Boy Scouts amounted to arbitrary discrimination, the court finds no violation of Mr. Merino's common law right of fair procedure, as Mr. Merino was afforded a meaningful opportunity to respond to the action taken against him.

REMEDIES

Mr. Merino has requested the court to reinstate him as an adult leader in the Boy Scouts, for damages under the Unruh Act and the San Diego Human Dignities Ordinance, an injunction reinstalling him as an adult leader of the Boy Scouts, a writ of mandamus commanding the Boy Scouts to charter the El Cajon Police Department as a Boy Scout Explorer Post and to reinstall Mr. Merino as its adult leader, and a declaration by the court of the rights of himself and the Boy Scouts regarding Mr. Merino's membership in Boy Scouts.

This court's determination is, the Boy Scouts may not exclude or remove avowed homosexuals from membership in the Boy Scouts, unless the conduct of such person is violative of Boy Scout rules which apply equally to all Boy Scout members without regard to homosexuality. Rules to protect Scouts from improper sexual contact or

solicitation, applying equally to heterosexual and homosexual adult leaders, are appropriate, and nothing set forth in this decision is intended to interfere with such rules.

The court sets monetary damages herein in the total amount of $5,000.00. [Civil Code section 52, subdivision (a).] There was little testimony regarding special damages. Mr. Merino did testify he paid the annual dues of himself and all Scouts in his Explorer Post – approximately $100.00 – per year. (Transcript March 21, 1994, p. 16, line 17 to p. 17, line 9.) Only brief testimony in regard to general damages was elicited. The psychological harm of removing a person as leader of a youth program to which he was devoted and committed is difficult to quantify. Mr. Merino stated he was, "very upset, indignant, I guess." (Transcript March 21, 1994, p. 19, lines 8-19.)

This court realizes the emotional impact of exclusion on a person can be devastating; however, Mr. Merino continued his employment and was apparently elected by the officers of the El Cajon Police Department to a position in the El Cajon Police Officers Association. (Transcript March 31, 1994, p. 14, lines 7-15.) Additional widespread moral support was provided Mr. Merino by friends and law enforcement persons. (Transcript March 21, 1994, p. 14, lines 3-6.)

After completion of trial in this matter, Mr. Merino was provided the opportunity to request an injunction for reinstatement as a Boy Scout Explorer Post Advisor. A ruling on Mr. Merino's Motion for Injunction was rendered on August 26, 1994. (*See*, Ruling on Motion for

Injunction – Calendared for August 26, 1994 (telephonic).) After consideration of the pleadings and the evidence presented at trial a Mandatory Injunction was issued as set forth in a separate order of this court.

Although Mandamus is a proper proceeding to compel the reinstatement to membership of one who has been illegally expelled from a duly organized association [*Smetherham vs. Laundry Workers' Union Local No. 75* (1941) 44 Cal.App.2d 131, 135], the court may not issue a writ of mandate unless petitioner shows both an inadequate remedy at law and exhaustion of remedies provided by the organization involved.

An inadequate remedy at law does not exist as the Unruh Act provides the authority to issue any orders which the court could issue through mandamus. Therefore, the prayed for Writ of Mandamus is denied.

Plaintiffs shall receive attorney's fees and costs.

CONCLUSION

Over the substantial history of the Boy Scouts of America, the organization has sought diversification of its membership. The Boy Scouts has shown exemplary tolerance in the area of religious acceptance. The Boy Scouts does not restrict membership on the basis of religion. The Boy Scouts is open to members of any religion so long as such religion recognizes a deity. The Boy Scout Handbook lists twenty-five religions which confer religious emblems to Scouts who meet the religious criteria. In addition to generally recognized American religions are Moravian, Zoroastrian, Armenian, Baha'i, Buddhist

and others. [*See*, Exhibit 12, The Boy Scout Handbook (10th ed.), pp. 624-625.]

Contrary to the exclusivity of their formal name, the Boy Scouts of America has, since 1971, accepted young women as members of Explorer Scout Posts. (*See*, Exhibit 14, Exploring, pp. 6, 81; Exhibit 23, Boy Scouts of America Charter and Bylaws, Article VI, section 1.)

The Boy Scouts is also actively recruiting new members in "low-income and minority communities" under the Urban Emphasis initiative; and the Boy Scouts has started 840 new packs, troops and posts in California and Texas during a three-year period under the Hispanic Emphasis initiative. (Exhibit 28, Preparing for the Future, p. 407.)

As to sexual preference, the testimony of virtually all defense witnesses was that the Boy Scouts only precludes membership to persons who are avowed homosexuals. Homosexuality "unavowed" is apparently not a basis for denial (or expulsion) from Scouting.

Witnesses called by the Boy Scouts believed and stated Mr. Merino could be heterosexual if he chose to. It was suggested that consultation with either religious officials or psychotherapists could change Mr. Merino. (Transcript March 21, p. 111, line 13 to p. 112, line 12.)

Mr. Merino stated he recognized his homosexuality since he was twenty years old. He did not believe his homosexuality was a part of his environment, given his Catholic background, church participation, his law enforcement family, and the anti-gay sentiment of his

parents' friends. Mr. Merino believes he was a homosexual from birth and cannot convert to heterosexuality. (Transcript, March 30, 1994, pp. 8 and 13.)[7]

Three witnesses testified on behalf of the Church of Latter Day Saints, the United Methodist Church and the Catholic Church, religious sponsors of a substantial number of Boy Scouts packs, troops and posts. These witnesses indicated acceptance of avowed homosexuals in the Boy Scouts may lead to withdrawal of religious sponsorship of the Boy Scouts. The principal concern of the persons who testified on behalf of religious sponsors was promoting homosexuality. No credible evidence was presented to suggest avowed homosexuals who are allowed to join the Boy Scouts would be allowed to advocate the morality of homosexual conduct to Scouting youth. In fact, such conduct is already grounds for removal from Boy Scouts. (Transcript March 21, 1994, p. 188, line 21 – p. 189, line 15.)

The Unruh Act prohibits generalization as a basis for exclusion or preclusion from any business establishment. Assumptions that women are indecisive, Catholics are stubborn, or Germans are insensitive, and based thereon will be disallowed membership or customer service, is illegal. Similarly, persons may not be excluded based on their sexual orientation.

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[7] Dr. Simon LeVay, a neurobiologist, testified homosexuality was a personal trait which could not voluntarily be changed. His paper, A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men (1991) Science Vol. 235, p. 1034, suggests that sexual orientation, at least in men, has a biological substrate.

If a woman, a Catholic, a German or a homosexual has acted or is acting contrary to reasonable membership requirements, an organization may preclude such person from becoming a member or move to expel such person, but such criteria must apply to all persons equally.

Had the Boy Scouts discriminated on the basis of race, not sexual orientation, most would not question the existence of an Unruh Act violation. (*See, Isbister supra,* 40 Cal.3d 72 at 91.) Correspondingly, arbitrary discrimination by the Boy Scouts against avowed homosexuals is prohibited under the Unruh Act. This court finds no overriding constitutional concerns to prevent application of the Unruh Act.

Based on these findings IT IS ADJUDGED, DECREED AND DECIDED:

1. Plaintiff is granted judgment.

2. Plaintiff is awarded monetary damages in the total amount of $5,000.00 plus attorneys' fees and costs of suit.

3. Defendants may not exclude or remove avowed homosexuals from membership in the Boy Scouts, unless the conduct of such person is violative of Boy Scout rules which apply equally to all Boy Scout members without regard to homosexuality.

4. A Mandatory Injunction shall issue as follows:

(1) That defendants SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA and BOY SCOUTS OF AMERICA, their agents, servants, assigns and all those acting in concert with them, reinstate the Boy Scouts charter for

the El Cajon Police Department Explorer Post upon application by Mr. Merino with the El Cajon Police Department as the sponsor;

(2) That upon such reinstatement of the charter, defendants SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA and BOY SCOUTS OF AMERICA, their agents, servants, assigns and all those acting in concert with them, reinstate plaintiff Merino as the Explorer Advisor of the El Cajon Police Department Explorer Post.

5. The Writ of Mandamus is denied.

[plus costs at $115,492.58 (11-21-94) /s/]

Dated: September 13, 1994

/s/ Anthony C. Joseph
ANTHONY C. JOSEPH
Judge of the
Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CHARLES MERINO, Plaintiff, v. SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA, et al., Defendants.	Case No. 659236 STIPULATED FACTS Department: 43 I/C JUDGE HON. ANTHONY C. JOSEPH Trial Date: March 21, 1994 (Filed March 21, 1994)

Pursuant to Local Rule 1.14(d)(2) of the San Diego County Superior Court, plaintiff Charles Merino and defendants San Diego County Council of Boy Scouts of America ("San Diego Council"), Boy Scouts of America, and Ron Brundage hereby stipulate to the following facts:

1. Boy Scouts of America is a federally-chartered non-profit organization.

2. Boy Scouts of America charters local councils to accomplish the purposes of Scouting and carry out its programs in a given geographic area. Duly chartered local councils are incorporated according to the not-for-profit laws of their states of incorporation.

3. Scouting is conducted through Scouting groups known as Cub Scout Packs and Dens, Boy Scout Troops and Patrols, and Explorer Posts.

4. San Diego Council is a duly chartered local council of Boy Scouts incorporated under the not-for-profit laws of California. The Council's purpose is that of supporting Scouting groups within San Diego County in accordance with the *Charter, Bylaws* and *Rules and Regulations* of Boy Scouts of America.

5. Boy Scouts charters sponsoring organizations meeting the requirements of the *Bylaws* and the *Rules and Regulations* of Boy Scouts of America to organize and maintain Scout groups in accordance with Boy Scouts of America policies. The El Cajon Police Department was one such organization that sought and was granted a charter by Boy Scouts of America to form and maintain Explorer Post 2245 in El Cajon, California.

6. The sponsoring organization is charged with providing suitable facilities for meetings and activities and with selecting adult leadership that meets with the standards for membership of Boy Scouts of America.

7. Every sponsoring organization appoints one delegate to the local council, which elects an executive board. Each local council has at least three delegates to the National Council. The National Council elects the National Executive Board, which sets national policy for Boy Scouts.

8. Each Scouting group is governed by the *Charter and Bylaws* and *Rules and Regulations* of Boy Scouts of America.

9. San Diego Council's 1992 projected income was in the amount of $2,375,596 and projected expenses were in the amount of $2,525,596.

10. San Diego Council employs approximately 44 full-time employees: 19 are proffesional [sic] scouters; 25 are non-commissioned employees. Among the 25 are six camp rangers and one field assistant; the rest are secretaries or clerical workers.

11. Membership of Boy Scouts of America in San Diego as of December 31st, 1992:

	Youth	Adult
Cub	11,981	4,266
Scout	6,489	3,444
Explorer	1,685	391
	20,155	8,101

12. National membership totals for Boy Scouts of America, as of the 1992 Annual Statement, was 4,150,148 youth members and 1,189,512 adult members.

13. Boy Scouts' total revenues for the year ended December 31, 1992 were $54,205,000. Total expenses for the year ended December 31, 1992 were $49,977,000.

14. The Scout Oath reads as follows:

> "On my honor
> I will do my best
> To do my duty to God and my country and
> To obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong, mentally
> awake, and morally straight."

15. "Morally Straight" in the Scout Oath is described to Boy Scouts in the *Boy Scout Handbook* as follows:

> "To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationship with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant."

16. The Scout Law reads as follows:

> "A Scout is: Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, and Reverent."

17. "Clean" in the Scout Law is described to Boy Scouts in the *Boy Scout Handbook* as follows:

"A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals he helps keep his home and community clean.

You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can't help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.

There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.

Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults."

18. The Explorer Code reads as follows:

"As an Explorer –

I believe that America's strength lies in her trust in God and in the courage and strength of her people. I will, therefore, be faithful in my religious duties and will maintain a personal sense of honor in my own life.

I will treasure my American heritage and will do all I can to preserve and enrich it.

I will recognize the dignity and worth of my fellowmen and will use fair play and goodwill in dealing with them.

I will acquire the Exploring attitude that seeks the truth in all things and adventure on the frontiers of our changing world."

19. The Declaration of Religious Principle reads as follows:

"The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, 'On my honor I will do my best to do my duty to God and my country and to obey the Scout Law.' The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members. No matter what the religious faith of the members may be, this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore recognizes the religious element in the training of the member, but it is absolutely nonsectarian in its attitude toward that religious training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life."

20. Adult leaders serve without pay from Boy Scouts of America or San Diego Council.

21. To become an adult leader for Boy Scouts Of America, an applicant must be 21 years of age, be a United States citizen, and complete and sign a volunteer

leader application. Adult leaders must subscribe to principles as set forth in the Oath and Law and the Declaration of Religious Principle. The adult applicant must also pay the national registration fee and his or her application must be signed by the Scout group's Committee Chairman, the Charfered Organization Leader and the Scout Executive or a designee.

22. One of the roles of an adult volunteer leader is to be a good role model for the youth in the Scout group.

23. Mr. Merino has been a police officer in the El Cajon Police Department since 1977.

24. In 1982 Mr. Merino came to be in charge of the El Cajon Police Department Cadet program.

25. In 1989 Mr. Merino sought and obtained permission from the Chief for the Department to affiliate with Boy Scouts of America as a chartered organization. He completed an application for the El Cajon Police Department to become a chartered organization of Boy Scouts of America to sponsor an Explorer Post. Mr. Merino also completed a volunteer leader application to be a member of Boy Scouts of America. Following the receipt of these applications Boy Scouts of America chartered Post 2245 and Mr. Merino became an adult member of Boy Scouts of America and the Explorer Advisor of Post 2245.

26. Mr. Merino remained an adult leader in Boy Scouts of America as Explorer Advisor of Post 2245 from 1988 to on or about August 25, 1992.

27. Mr. Merino first publicly announced that he is a homosexual in December 1991.

28. Because Boy Scouts of America believes that homosexual conduct is inconsistent with the Scout oath and Law, Boy Scouts of America does not accept known or avowed homosexuals as adult leaders.

29. Boy Scouts of America suspended Mr. Merino's registration as an adult on or about August 25, 1992.

30. After Mr. Merino's membership as an adult volunteer was suspended, the El Cajon Police Department chose to withdraw its sponsorship of the Explorer program and resumed operating its Cadet program.

Dated: March 21, 1994

BOBBITT & GATTEY

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(Filed Jun 27, 1997)

Ct of Appeal # D021969
Superior Ct. # 659236

IN THE

SUPREME COURT OF CALIFORNIA

CHARLES MERINO,

Petitioner,

v.

SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA; RON BRUNDAGE; and BOY SCOUTS OF AMERICA,

Respondents.

After a Decision by the Court of Appeal
Fourth Appellate District, Division One
Ct. of Appeal # D029169

PETITION FOR REVIEW

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Ct of Appeal # D021969
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IN THE

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CHARLES MERINO,

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After a Decision by the Court of Appeal
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PETITION FOR REVIEW

I.

ISSUES PRESENTED

Issue #1

Whether the Boy Scouts is a business establishment under the Unruh Act, California Civil Code section 51, and thus prohibited from discrimination against homosexuals.

Issue #2

Whether the Boy Scouts may be considered a business establishment under the Unruh Act when it operates in conjunction with a public agency.

Issue #3

Whether the Boy Scouts, when operating in conjunction with a public agency, may take personnel action that would violate Labor Code section 1102.1, specifically, discrimination against homosexuals.

Issue #4

Whether the Petitioner's rights under the San Diego Human Dignity Ordinance, San Diego Municipal Code section 52.9601 *et seq.*, prohibiting discrimination against homosexuals, were violated.

II.

STATEMENT OF FACTS

In May 1989, Petitioner CHARLES MERINO, a police officer with the El Cajon Police Department (ECPD) applied to Boy Scouts, through its chartered local council, San Diego County Council of the Boy Scouts of America, for an Explorer Post charter. MERINO, who was in charge of the ECPD Cadet program, sought to convert the Department's existing Cadet program into a law enforcement Explorer Post, a scouting group within Boy Scouts. In order to be the adult advisor of the Post, MERINO applied to be an adult member of the Boy Scouts. Boy Scouts chartered the El Cajon Police Department as a sponsor of Explorer Post 2245 and approved MERINO's

application to be a volunteer adult member of the Boy Scouts.

Exploring is the young adult program of the Boy Scouts of America for men and women aged 14 through 20. The program is developed by local community organizations, such as the El Cajon Police Department, which match the interests of young adults with the program resources of the chartered organization. The program, leadership, and membership of the Explorer Post are determined by the chartered organization within the framework of the policies and standards of the Boy Scouts of America. The Explorer Post charter agreement between ECPD and Boy Scouts states, among other things, that the Department agrees to "conduct the Scouting program according to its own policies and guidelines as well as those of the Boy Scouts of America" and Boy Scouts agrees to "respect the aims and objectives of the organizations and offer the resources of Scouting to help in meeting those objectives."

In approximately December 1991, MERINO became involved in organizing a Citizens Patrol to patrol the Hillcrest area of San Diego, where MERINO lived, to assist police in the prevention of the numerous and increasing assaults and batteries on homosexuals in the Hillcrest area at the time. Boy Scouts learned of MERINO'S activities and determined that MERINO was an avowed homosexual. Boy Scouts views homosexuality as inconsistent with Scouting principles, specifically the requirement in the Scout Oath to be "morally straight". Boy Scouts therefore do not permit known or avowed homosexuals to be adult leaders. On the basis of his homosexuality, Boy Scouts, by letter dated August 25,

1992, signed by Council President RONALD BRUNDAGE suspended MERINO'S registration.

The El Cajon Police Department, as a public agency, may not discriminate on the basis of sexual preference. It was the opinion of then-Chief of Police Jack Smith that it would be an unlawful adverse employment decision if he were to remove MERINO from the position of Explorer Post Advisor based on his sexual orientation. Chief Smith therefore allowed the El Cajon Police Department's Explorer program charter to expire. If MERINO is reinstated as the Explorer Advisor, the charter agreement will be reinstated, with MERINO as the advisor.

III.

CASE HISTORY

MERINO filed suit on December 14, 1992. The suit named as defendants SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA, RON BRUNDAGE, and the CITY OF SAN DIEGO. The complaint prayed for a Writ of Mandamus ordering the BOY SCOUTS to reinstate MERINO to his membership in BOY SCOUTS and to his position of Explorer Post Advisor, a permanent injunction preventing BOY SCOUTS from expelling MERINO from membership solely on the basis of his homosexuality, a writ commanding the CITY OF SAN DIEGO to terminate its lease with the BOY SCOUTS, and Declaratory relief.

The Court granted Summary Judgment to the CITY OF SAN DIEGO, holding that the relief sought against the City was premature.

The case went to trial on March 21, 1994. On July 7, 1994, the trial court, Hon. Anthony C. Joseph, ruled that the Boy Scouts had discriminated against MERINO in violation of the Unruh Act, and that the San Diego Human Dignity Ordinance did not apply since the Explorer Post was in the City of El Cajon and therefore "outside the jurisdiction of the Ordinance". The Court granted relief to MERINO as follows: $5000.00 in monetary damages; attorneys fees; and a Mandatory Injunction ordering the BOY SCOUTS to reinstate the Explorer Post charter for the El Cajon Police Department, upon application by MERINO, and to reinstate MERINO as the Explorer Advisor of the El Cajon Police Department post.

BOY SCOUTS appealed the court's judgment. MERINO cross-appealed on the court's ruling that the Human Dignity Ordinance did not apply. After briefing and oral argument, the Court of Appeal, on May 21, 1997, reversed the judgment of the trial court with respect to the finding that BOY SCOUTS violated the Unruh Act, and affirmed the trial court's findings that the San Diego Human Dignity Ordinance did not apply.

MERINO petitioned the Court of Appeal for rehearing, based on the fact that the Court of Appeal did not consider issues (Issues #2 and #3) presented by MERINO in the briefs and at oral argument. The court denied MERINO's Petition for Rehearing on May 21, 1997.

IV.

WHY REVIEW SHOULD BE GRANTED

Issue #1

Whether the Boy Scouts is a business establishment under the Unruh Act, California Civil Code section 51, and thus prohibited from discriminating against homosexuals.

The Unruh Act, Civil Code section 51 *et seq.*, provides that "all persons within the jurisdiction of the state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability, are entitled to the full and equal accommodations, advantages, and facilities, privileges, or services in all business establishments of every kind whatsoever." The Act also prohibits discrimination on the basis of sexual orientation. *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1155-1156 (1991); *Beatty v. Truck Ins. Exchange*, 6 Cal. App. 4th 1455, 1460 (1992).

What constitutes a business establishment, as opposed to a private club, has been the subject of much confusion, and resulted in significant volume of litigation. This is because many entities have attributes that make their status under the law difficult to discern. The Boy Scouts is such an organization.

The case law that has developed over the years analyzing the Unruh Act has not specifically held whether or not the Boy Scouts are a business establishment under the Unruh Act. While recent case law has made clear that certain types of establishments such as non-profit boys clubs (*Isbister v. Boys Club of Santa Cruz,*

Inc., 40 Cal. 3d 726 (1985)) and country clubs (*Warfield v. Peninsula Golf & County Club*, 10 Cal. 4th 594 (1995) are business establishments within the meaning of the Unruh Act, neither of these lower court cases have settled the issue of whether the Unruh Act applies to the Boy Scouts because neither of these organizations, according to the Court of Appeal, are sufficiently analogous to the Boy Scouts. In order for the issue to be resolved, the court must issue a decision that specifically applies to the Boy Scouts.

This court should decide this issue because the rights and responsibilities of an organization as large and as renowned as the Boy Scouts should be as well defined as possible. Whether or not the Boy Scouts may discriminate on the basis of sexual orientation is a question that should be resolved, not just for the benefit of those who are currently members, but for those who would like to be members. Furthermore, Boy Scouts is a large and culturally significant organization, such that the question of whether Boy Scouts may deny membership on the basis of sexual orientation is one that would have relevance on the lives and livelihoods of a significant portion of the state populous.

Additionally, the court has agreed to decide this very issue, but has not yet done so. This court had granted review to the cases *Randall v. Orange County Council of the Boy Scouts of America* (Review Granted, 6-2-94) and *Curran v. Mt. Diablo Council of the Boy Scouts of America* (Review Granted, 6-2-94). This issue is identical to the issue that will be resolved by the *Randall* and *Curran* cases. Petitioner MERINO, who has been litigating this case for five years now, should not have his case turned away when

the court has agreed to consider granting relief to those similarly situated.

Issue #2

Whether the Boy Scouts may be considered a business establishment under the Unruh Act when it operates in conjunction with a public agency.

The legal status of the Boy Scouts under the Unruh Act turns on the issue of whether Boy Scouts are a business establishment, or a private social club. Status as the latter type of organization does not bring them under the umbrella of the Unruh Act, for the reason that the Unruh Act does not attempt to regulate (nor would the Constitution permit its regulation of) purely social relationships. Government cannot compel the inclusion of anyone into a purely social, non-business relationship. People are free to socialize or not to socialize with whomever they see fit, for whatever reason.

However, when an organization opens its doors to the public, it must follow the requirements of the Unruh Act. An organization that opens its doors to the public must leave the door open to all types of people, and may not exclude on the basis of race, gender, religion, or sexual orientation. *Isbister v. Boys Club of Santa Cruz, Inc.*, 40 Cal. 3d 72 (1985) (holding that Boys Club was a traditional "public accommodation" and therefore subject to the Unruh Act).

Even if the Boy Scouts are not said to have opened their doors to the public with respect to general membership, they have done so with respect to Explorer Post Advisors. Boy Scouts opened their doors to a public

agency in order to establish an Explorer post to be run by the El Cajon Police Department. By opening their doors to the El Cajon Police Department, the Boy Scouts opened the Explorer Post Advisor position up to the public.

As a public agency, the El Cajon Police Department cannot discriminate on the basis of race, gender, religion, or specifically, sexual orientation. It cannot discriminate in hiring, promotions, job assignment, or in any personnel areas. ECPD could not prevent homosexual from holding any positions within the ECPD. If an Explorer Post Advisor position existed, the ECPD could not prevent a homosexual from filling the position.

Thus, by opening its doors to a public agency that could not lawfully discriminate on the basis of sexual orientation, the Boy Scouts opened its doors to any member of the ECPD to become its Explorer Post Advisor. Since employment with ECPD must necessarily be open to all qualified members of the public, opening one's doors to the ECPD is no different than opening its doors to the public.

MERINO'S case therefore presents an issue that is separate and distinct from the cases that are currently before this court regarding the applicability of the Unruh Act to the Boy Scouts: Whether the Boy Scouts may be considered a business establishment under the Unruh act when it operates in conjunction with a public agency.

This issue should be heard by this Court. The *Warfield* decision suggests that the court is moving away from its past Unruh Act analysis, which focused on examining the character of the organization to see whether it is, at its core, a business establishment, or a social club. This type

of analysis involved a five-prong "totality of the circumstances" approach which took into consideration the following factors:

> "(1) the selectivity of the group in the admission of members, (2) the size of the group, (3) the degree of membership control over the governance of the organization (and particularly the selection of new members), (4) the degree to which club facilities are available for use by nonmembers, and (5) whether the primary purpose served by the club is social or business." *Warfield*, 10 Cal. 4th at 620-1 *citing Nesmith v. Young Men's Christian Ass'n of Raleigh, N.C.* (4th Cir. 1968) 397 F.2d 96, 98-102; *Cornelius v. Benevolent Protective Order of Elks* (D.Conn. 1974) 382 F. Supp. 1182, 1203-1204 (three-judge court); *Wright v. Cork Club* (S.D. Tex. 1970) 315 F. Supp. 1143, 1150-1153; *United States Jaycees v. McClure*, supra, 305 N.W.2d 764, 770-771, affd. *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 82 L. Ed. 2d 462, 104 S. Ct. 3244.)

Warfield suggests that Unruh Act analysis should not focus on the organization as whole, but on the activities in which the organization is engaged, to see if those activities are such that the organization has opened itself to the public.[1] This is an entirely different method analysis than that which the Court of Appeal applied, and

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[1] In *Warfield*, this Court held that because the Country Club engaged in significant business transactions with non-members on its premises, it must be considered a business establishment within the meaning of the Unruh Act, which intended that the term "business establishment" be used "in the broadest sense reasonably possible" *Warfield*, 10 Cal. 4th 492, at 609-10.

The business contacts with the public were deemed to be significant in *Warfield* because of the financial benefits realized

one that recognizes that organizations often engage in both private and public activities.

The Court of Appeal's Unruh Act analysis breaks down when an organization is involved in multiple activities, some of which can be considered "business" and some "social". It forces a court to classify the organization as either a social club or a business establishment, even when the organization may have attributes of both, or neither, or may engage in some activities that are characteristic of a private club, and some that are characteristic of a business establishment. The result is violence done to both the Unruh Act and the right of association. Classification of an organization as a "business establishment" may erode the organization's truly private social activities. Conversely, classification of an organization as a private club may allow the organization that otherwise opens its doors to the public, to exclude people on the basis of race, gender, religion, or sexual orientation, clearly violating the spirit of the Unruh Act.

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by the country club. However, the Court's focus on the financial transactions between members and non-members in *Warfield* was because, in that case, it was through continuous and significant financial transactions that the country club opened itself up to the public. *Warfield* should not be read to stand for the proposition that it is only through financial transactions with the public that an organization may open itself up to the public, for purposes of the Unruh Act. An organization that establishes a partnership with a public agency for the purpose of providing services to its members is opening itself up to the public just as the country club in *Warfield* did by engaging in financial transactions.

The court should use this issue as an opportunity to clarify its analysis of the Unruh Act. It is an issue that has widespread implications, not just to MERINO and the Boy Scouts, but to all social clubs that engage in business activity, and to all businesses that engage in social activity.

In *Isbister,* and later repeated in *Warfield,* the Court wrote:

> . . . [W]e have emphasized that the statute does not govern relationships that are truly private . . . those which are 'continuous, personal, and social' and take place more or less outside of public view. 'Private' groups and institutions do not fall prey to the Act simply because they operate 'nongratuitous' residential or recreational facilities for their members or participants; an 'accommodation' must be 'public' to be covered.
>
> *Warfield,* 10 Cal. 4th 492 at 618.

The language of the Court in *Warfield* suggests that Unruh Act analysis will focus on the 'accommodation' being provided rather than the character of the organization as a whole. If the 'accommodation' is made open to the public, the organization will not be considered a 'business establishment' for the purposes of this 'accommodation'.

This analysis is far more sound than the analysis used by the Court of Appeal[2] or, which analyzed the

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[2] Although the Court of Appeal claimed to follow *Warfield,* it in fact, followed the five-prong analysis articulated in *Isbister*

character of the organization rather than the specific activity or accommodation in question. If the Court of Appeal's reasoning were permitted to stand, the Boy Scouts, because of their status as a 'private club' could be free to discriminate even in their non-private activities. Boy Scouts would be free to exclude African-Americans from their annual Scout Fair, which is open to the entire public, because the Boy Scout organization is not subject to the Unruh Act. Other private clubs that operate public accommodations would similarly be free to discriminate in their business activities. Girl Scouts would be permitted to refuse to sell cookies to Jews. The Kiwanis Club could refuse service to homosexuals at their pancake breakfasts, which are open to the public.

The above results are indeed absurd, but they logically follow from an Unruh Act analysis that does not focus on the specific accommodation and instead is based on the 'character' of the organization. Under an activity-based analysis, the Boy Scouts, the Girl Scouts, and the

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which this Court in *Warfield* specifically declined to follow. In *Warfield*, this Court wrote:

> . . . [W]e conclude that there is no need to determine whether [the country club] constitutes a "private club" rather than a place of public accommodation under the multi-pronged standard developed in the out-of-state cases, because we conclude that the business transactions that are conducted regularly on the club's premises with persons who are not members of the club are sufficient in themselves to bring the club within the reach of section 51's broad reference to "all business establishments of every kind whatsoever".

Warfield, 10 Cal. 4th 492 at 621.

Kiwanis could select whomever they chose as their members, but they could not discriminate when they opened their doors to the public.

Even if the Court of Appeal were correct that the Boy Scouts were a private club with respect to their general membership, the Court failed to analyze the facts unique to MERINO's case: The fact that the Boy Scouts opened their doors to the public by establishing an Explorer Post with a public agency. The Boy Scouts cannot refuse to allow a homosexual employee of a public agency to be an Explorer Post advisor any more than the Girl Scouts could refuse to sell cookies to homosexuals.

The court should hear this issue in order to clarify its Unruh Act analysis, and to demonstrate how the Unruh Act will be applied to private organizations that open themselves up to the public. Hearing this case would also allow the Court to clarify when an organization has "opened itself to the public". This court has held that the Unruh Act does not apply to relationships that are "continuous, personal, and social, and take place more or less outside public view". (Internal citations omitted). The term "more or less outside public view" needs clarification if the Boy Scouts' partnership with a public agency in running an Explorer Post is considered "outside of public view".

The court of appeal refused to consider this issue, even upon a motion for rehearing.

Issue #3

Whether the Boy Scouts, when operating in conjunction with a public agency, may take personnel action that would violate Labor Code section 1102.1, specifically, discrimination against homosexuals.

Even if the Boy Scouts are found not to be a business establishment in any respect, the issue remains whether the Boy Scouts may, when it operates in conjunction with a public agency, discriminate against homosexuals, which the Labor Code forbids the public agency from doing.

Labor Code section 1102.1 states:

> [Labor Code] Sections 1101 and 1102 prohibit discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation. (Michie's, 1997)

If the El Cajon Police Department had established an Explorer Post within the department, but had prevented MERINO from holding the position of Advisor, the department would have been in violation of the Labor Code.[3]

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[3] This is undoubtedly why the Boy Scouts allow women to be Explorer Post Advisors. Boy Scouts know that it could not establish an Explorer Post with a public agency if it restricted the Advisor position to men. No public agency, consistent with the Labor Code, could allow its female employees to be discriminated against in their employment. Boy Scouts must have known that if the El Cajon Police Department acceded to the demands of the Boy Scouts, it would be violating the Labor Code.

Yet, this is exactly what the Boy Scouts were allowed, by the Court of Appeal to do to Merino. Boy Scouts suspended MERINO's membership so that he could not be an Advisor. Since the department refused to violate the Labor Code by installing another ECPD officer as Advisor, the department had no choice but to terminate the Post.

This issue should be heard because unless there is clear guidance as to whom and when the Labor Code applies, public employees may find themselves losing the protections guaranteed by the Labor code because their employing agency undertook a project with an organization not covered by the Unruh Act. If an organization that may lawfully discriminate with respect to its own membership is allowed to come into a public agency and begin discriminating against the employees of that agency, then the protections of the Labor Code are in jeopardy, and this Court should use this case as an opportunity to establish the guidelines for affiliations of public agencies with private organizations not subject to the Unruh Act.

The Court of Appeal refused to consider this issue, even upon a Petition for Rehearing.

Issue #4

Whether the Petitioner's rights under the San Diego Human Dignity Ordinance, San Diego Municipal Code section 52.9601 *et seq.*, prohibiting discrimination against homosexuals, were violated.

The Court of Appeal held that MERINO'S rights under the San Diego HDO was not violated, by summarily concluding that "it is enough for our purposes to

state that BSA does not qualify as a business establishment in San Diego or elsewhere, and the subject relationships do not fall under City of San Diego jurisdiction".

This issue has statewide implications. Many municipalities have enacted similar ordinances designed to broaden the scope of protection from discrimination beyond the Unruh Act. The Court of Appeal's decision implies that such local ordinances can only be coextensive with the Unruh Act. If this reasoning is correct, then hundreds of similar local ordinances statewide will be invalidated.

The HDO is specifically intended to have broader application than the Unruh Act. Its definition of a business establishment is far more inclusive than the Unruh Act. The HDO defines a business establishment as:

> [A]ny entity, however organized, which furnishes goods or services to the general public. An otherwise qualifying establishment which has membership requirements is considered to furnish services to the general public if its membership requirements: (a) consist only of payment of fees, or (b) consist of requirements under which a substantial portion of the residents of this City could qualify. San Diego Municipal Code, section 52.9602, subd. I

It could hardly be disputed that under this ordinance, the Boy Scouts would qualify as a business establishment. Yet the Court of Appeal's holding seems to be that if an organization is not a business establishment under the Unruh Act, it is not a business establishment for any purpose. This interpretation not only affects MERINO, but the residents of every municipality with a

local anti-discrimination ordinance that is broader than the Unruh Act.

The Court of Appeal further concluded that the HDO did not apply in this case. The Court affirmed trial court's decision regarding the HDO which stated that

> [t]his relationship is outside the jurisdiction of the Ordinance. The fact that the local counsel of the Boy Scouts was headquartered in San Diego is of no effect.
>
> (CT, 712-13).

MERINO, a resident of the City of San Diego, was stripped of his membership by the San Diego County Council of the Boy Scouts, which is located in the City of San Diego. Under the trial court's reasoning, no national business with branches or headquarters in San Diego is subject to the San Diego HDO.

The court should hear this issue because it concerns a statewide issue of major importance: the applicability of local anti-discrimination ordinances. The trial court and the Court of Appeal's ruling would seem to be the death knell of local anti-discrimination ordinances if 1) a local ordinance cannot define a business establishment more broadly than the Unruh Act, and 2) the local ordinance cannot reach national businesses and organizations that have branches or headquarters in the municipality. Unlike local anti-discrimination statutes that deal with discrimination in employment, there has been no case law to date that has indicated that the Unruh Act was intended to pre-empt local anti-discrimination ordinances. *See Delaney v. Superior Fast Freight*, 14 Cal. App.

4th 590 (1993) (holding FEHA intended to pre-empt local anti employment discrimination statutes).

If the Unruh Act pre-empts local anti-discrimination statutes, this court should so state. If the Unruh Act has not effected a pre-emption, this court should hear this issue in order to determine whether the Boy Scouts may be considered a business under the San Diego HDO, and whether the San Diego HDO may reach the local council of the Boy Scouts.

CONCLUSION

For the foregoing reasons, we respectfully request that this petition for review be granted.

Dated: 7-26-97

Respectfully Submitted,

LAW OFFICES OF EVERETT L. BOBBITT

/s/ Everett Bobbitt
Everett L. Bobbitt,
Attorney at Law
Sanford A. Toyen,
Attorney at Law
Attorneys for Petitioner
CHARLES MERINO

4/1 No. D021969/D022829
S062514

IN THE SUPREME COURT OF CALIFORNIA

CHARLES MERINO, Appellant

v.

SAN DIEGO COUNTY COUNCIL OF THE BOYS SCOUTS et al., Appelants
And Companion Case

(Filed July 30, 1997)

Petition for review GRANTED.

Further action in this matter is deferred pending consideration and disposition of a related issue in *Curran v. Boy Scouts of America*, S039738 (see Cal. Rules of Court, rule 29.2(c)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 29.3, is deferred pending further order of the court.

George

Chief Justice
Mosk

Associate Justice
Kennard

Associate Justice
Baxter

Associate Justice

Werdegar

Associate Justice

Chin

Associate Justice

Brown

Associate Justice

Fourth Appellate District, Division One
No. D021969/D022829
S062514

IN THE SUPREME COURT OF CALIFORNIA

CHARLES MERINO, Appellant

v.

SAN DIEGO COUNTY COUNCIL OF THE BOYS SCOUTS et al., Appellants
and companion case

(Filed July 8, 1998)

Pursuant to Rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, Fourth Appellate District, Division One.

George

Chief Justice

Mosk

Associate Justice

Kennard

Associate Justice

Baxter

Associate Justice

Werdegar

Associate Justice

Chin

Associate Justice

Brown

Associate Justice

COURT OF APPEAL – STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division One

Clerk of the Superior Court
San Diego County
220 W. Broadway Street
San Diego, CA. 92101

RE: MERINO, CHARLES
Plaintiff-Respondent-X/Applt
v.
SAN DIEGO CO. COUNCIL OF THE BOY SCOUTS
Defendant-Appellant-X/Respond
D021969 AND D022829
San Diego County No. 659236

* * REMITTITUR * *

I, Stephen M. Kelly, Clerk of the Court of Appeal of the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on May 21, 1997, and that this opinion or decision has now become final.

_____Appellant _____Respondent to recover costs.
__✓__Each party to bear own costs.
_____Costs are not awarded in this proceeding.

Witness my hand and the seal of the court affixed this ~~July 23, 1997.~~ JUL 14 1998

[SEAL]
STEPHEN M. KELLY, Clerk

By: /s/ Illegible
Deputy Clerk

cc: All Counsel (Copy of remittitur only, California Rules of Court, rule 25(e)).